

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2141

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

D-Z INVESTMENT COMPANY,
Plaintiff-Appellee,
against

ROBERT E. HOLLOWAY, MELVIN S. TAUB, MAU-
RICE J. BRICK, PETER E. SIMON, NORMAN
BRASSLER, CHARLES GILLER, HERBERT E.
HARPER, Dr. GORDON McKINLEY, JAMES R.
MOSELEY, III, JACK G. TAYLOR and DALLAS S.
TOWNSEND, Jr.,

Defendants-Appellants,

NJB PRIME INVESTORS,
Defendant,
and

SECURITY MANAGEMENT CO., INC., CANTOR,
FITZGERALD & CO., INC., BRUCE R. DAVIS,
JEROME ZIMMERMAN, RALPH M. BECKER, SAUL
BECKER, BERNARD KROLL, MAX SOPHIER,
HAROLD LEVOW, HAROLD B. LEVIN, HARVEY
JACOBSON, SEYMOUR WEINBERG and RONALD
D. FEINMAN,

*Additional Defendants
to Counterclaims.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

Volume 1

Pages A1 to A512

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DOCKET ENTRIES

D - 2 INVESTMENT COMPANY / ROBERT HOLLOWAY ETC ETAL WYATT J.

74 W. 23

DATE	PROCEEDINGS	Date Order Judgment
JUN 4 74	Filed complaint & issued summons.	
JUN 3 74	Filed order for service Jerome Moses Clerk	
Jun 5.74	Filed Affidavit of Personal Service by Jerome Moses on 6/3/73 of Summons & Complaint.	
Jun 5.74	Filed Pltffs. Memorandum of Law.	
Jun 5.74	Filed Order to Show Cause. Re: Preliminary Injunction. ret. 6/7/74. Wyatt J.	
Jun 6.74	Filed Affidavit by Lawrence F. Orbe.	
Jun 7.74	Filed Affidavit by David Greenberg in support of pltff. D-2 Investment Co. motion for a preliminary injunction.	
Jun 7.74	Filed Affidavit of William Kirschner in opposition to motion for Preliminary Injunction.	
Jun 7.74	Filed Affidavit by Alfred J. Law in response to a letter dated 6/5/74 affidavits submitted by David M. Brainin. to have the firm for NJB Prime Investors disqualified.	
Jun 7.74	Filed Brief of Dft. NJB Prime Investors in opposition to motion for Preliminary Injunction.	
Jun 7.74	Filed Affidavit of Michael W. Mitchell in opposition to pltffs. motion for Preliminary Injunction.	
Jun 7.74	Filed Affidavit by Leon C. Baker in support of Pltffs. application to disqualify Skadden Arps.	
Jun 7.74	Filed Affidavit of Robert E. Holloway in opposition to motion for Preliminary Injunction.	
Jun 7.74	Filed Affidavit of Melvin S. Taub in opposition to Motion for Preliminary Injunction.	
Jun 10.74	Filed Affidavit by Jerry Panzer in opposition to motion of Pltff.	
June 11-74	Filed OPINION #40,798-Pltff's motion for a preliminary injunction is denied. So Ordered....Connells, J.....Mailed notices 6-12-74	
June 11-74	Filed pltff's notice of appeal from order denying application for a preliminary injunction entered 6-11-74. Mailed copy to Skadden Arps Stone Mather & Flom 919 Third Ave., N.Y.C. 10022	
Jun 12.74	Filed Transcript of proceeding dated 6/7/74. Before Connells J.	
Jun 12.74	Filed Transcript of proceeding dated 6/7/74. Pgs. 1-8. Before Wyatt J.	
Jun 25.74	Filed Dft. NJB Prime Investors Notice of Motion & Supporting affidavits. Re: Add Additions Defts. to Counterclaims. ret. 7/12/74.	
Jun 25.74	Filed Dft. NJB Prime Investors Memorandum of Law.	
Jun 25.74	Filed Dft. NJB Prime Investors ANSWER & Counterclaims.	
Jun 28.74	Filed Slip & Order that the time for dft. NJB Prime Investors to answer is extended to 7/8/74. Wyatt J.	
JUN 1.74	Filed Order to Show Cause with a Stay. Ordered that all proceedings in the instant action are Stayed as indicated. Wyatt J. Ret. 8/10/74.	
Jul 9.74	Filed Defts Robert E. Holloway, et al. Notice of Deposition of Cantor, Fitzgerald & Co., Inc. on 7/15/74.	
Jul 9.74	Filed Dft. Robert E. Holloway, et al. Notice of Depositions of Security Management Co., Inc. on 7/17/74.	
Jul 9.74	Filed Defts. Robert E. Holloway, et al. Notice of Deposition of Harold B. Levine, Bernard Kroll, Max Sophie, Harold Levov, Harvey Jacobson, Seymour Weinberg on dates as indicated.	
Jul 10.74	Filed Order to Show Cause. Ordered that effective 7/10/74 at 5:00 all discovery in the instant action is STAYED as indicated Ret. 7/16/74. Hard J.	
Jul 16.74	Filed Order to Show Cause to Quash subpoena, etc. Ret. 7/16/74. (Hard J.)	
Jul 16.74	Filed Transcript of proceeding dtd. 7/12/74. (Hard J.)	
Jul 16-74	Filed response to the request embodied in the Notice of Deposition served by the individual defts for the production of documents at the taking of pltffs deposition.	
Jul 27-74	Filed affidavit of Herbert M. Wachtell in opposition to the motion of pltff. for a order staying all discovery, etc.	

Continued

Docket Entries

74 Civil 2379

D-Z Investment Co. vs. Robert Holloway, etc. et al.

74 Civil 2379

U. S. 110 Rev. Civil Docket Continuation

Wyatt J.

DATE	PROCEEDINGS	Date Ord Judgment
Jul 19.74	Filed Order to Show Cause for Preliminary Injunction, Duffy J. & Affidavit in support attached.	
Jul 19.74	Filed Deposition of Jerome Minkerman on 7/15/74. (mailed notice)	
Jul 19.74	Filed Deposition of Lawrence F. Orbe III on 7/16/74. (mailed notice)	
Jul 19.74	Filed Deposition (Continued) of Lawrence F. Orbe III on 7/17/74. (mailed notice)	
Jul 19.74	Filed Deposition of Orbe starting from page 153 to 210. (mailed notice)	
Jul 19.74	Filed Deposition of Orbe starting from page through 326. (mailed notice)	
Jul 22.74	Filed Order that the deposition & attendant document production as now scheduled pursuant to various orders of Court & the stip. & agreements of counsel with respect thereto. Duffy J. (mailed notice)	
Jul 25.74	Filed Memo. End. on Order to Show Cause dtd. 7/16/74. The Order to show cause is disposed of in accordance with the decision rendered in open court on 7/16/74. See record minutes of that proceeding Duffy J. (mailed notice)	
Jul 18.74	Filed Defts. Robert E. Holloway, et al. Answer & Counterclaims.	
Jul 22.74	Filed Pltffs. Notice of depositions of Melvin S. Taub, et al. on dates as indicated.	
Jul 22.74	Filed Defts. Robert E. Holloway Notice of Deposition of Ronald D. Eirman on 7/25/74.	
Jul 22.74	Filed Defts. Robert E. Holloway, et al. Notice of Deposition of Saul Becker on 7/26/74.	
Aug 5.74	Filed Individual Deft. Trustees of NJB Prime Investors Memorandum of Law.	
Aug 5.74	Filed Supplemental Affidavit by Bertram M. Kantor.	
Aug. 6-74	Filed pltff's REPLY TO COUNTERCLAIMS of defts. R.E. Holloway et al	
Aug. 6-74	Filed transcript of record of proceedings of July 9, 1974.	
Aug 7.74	Filed Stip & Order that Defts. motion for preliminary injunction is adjourned to 8/16/74; & all solicitations of proxies including the solicitation of any consents to the call of a special meeting of shareholders of NJB Prime Investors etc. shall be Stayed. So Ordered Stewart J. (
Aug 9.74	Filed Stip & Order that pltffs. motion for disqualifying the firm of Skadden, etc. act as counsel for NJB etc. is adjourned to 9/27/74, etc. Stewart J.	
Aug 7.74	Filed Affidavit of Service by Mail by Francine Adler on 8/6/74.	
Aug 15.74	Filed Affidavit in opposition to individual defts. motion for preliminary injunction by Joseph B. Russell.	
Aug 15.74	Filed Affidavit of William P. Miller in opposition to 23 individual defts. motion for preliminary injunction.	
Aug 15.74	Filed Affidavit of Bruce R. Davis in opposition to individual defts. motion for preliminary injunction.	
Aug 15.74	Filed Pltffs. Memorandum of Law in opposition to defts. motion for preliminary injunction.	
Aug 22.74	Filed Reply Memorandum of Law in support of deft. Trustees Motion for a preliminary injunction.	
Aug 22.74	Filed Deposition of Mr. Harvey Jacobson on 7/22/74. (mailed notice)	
Aug 23.74	Filed Deposition of Dr. Seymour P. Weinberg on 7/23/74. (mailed notice)	
Aug 23.74	Filed Deposition of Harold A. Levow on 7/22/74. (mailed notice)	
Aug. 23-74	Filed OPINION: A 41,110--Motion by the individual defts. for a preliminary injunction is denied. The foregoing contains the findings of fact & conclusions of law. So Ordered--Wyatt J. Mailed notices.	
Aug. 23-74	Filed pltff's curareply memorandum of law in opposition to defts' motion for a preliminary injunction.	
Aug. 26-74	Filed notice of appeal by defendants' Robert E. Holloway, Melvin S. Taub, Maurice J. Peter E. Simon, Norman Brassier, Charles Giller, Herbert A. Harper, Dr. Gordon H. Jones R. Hooley, III, Jack G. Taylor and Dallas S. Townsend, from order dated filed on Aug 23-74 denying motion for preliminary injunction as filed by	
	mailed.	

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VERIFIED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x

D-Z INVESTMENT COMPANY,	:	
	:	
Plaintiff,	:	74 Civil File
	:	Action No. 2579
-against-	:	Judge WYATT
ROBERT E. HOLLOWAY, MELVIN S. TAUB,	:	<u>VERIFIED COMPLAINT</u>
MAURICE J. BRICK, PETER E. SIMON,	:	
NORMAN BRASSLER, CHARLES GILLER,	:	
HERBERT E. HARPER, DR. GORDON MCKINLEY,	:	
JAMES R. MOSELEY, III, JACK G. TAYLOR,	:	
DALLAS S. TOWNSEND, JR. and NJB PRIME	:	
INVESTORS,	:	
Defendants.	:	

----- -x

Plaintiff, D-Z INVESTMENT COMPANY ("D-Z"), by its attorneys, Rubin Wachtel Baum & Levin, for its complaint herein makes the following allegations upon information and belief, except for those made in paragraphs 3 and 7 which are made upon knowledge:

JURISDICTION AND VENUE

1. Defendants and their non-defendant co-conspirators have engaged, are engaged, or, are about to engage in acts, practices, and courses of conduct which have constituted, do constitute, and will constitute violations of the Securities Exchange Act of 1934, as amended (the "Act").

2. This action, which is brought (a) to enjoin defen-

Verified Complaint

dants from continuing to violate the Act and from committing other and further violations thereof and (b) to redress defendants' past violations of the Act, arises specifically under Section 14(a) of the Act, 15 U.S.C. 78n(a), and the consequent rules and regulations governing the acquisition of corporate control and the solicitation of proxies.

3. D-Z brings this action on its own behalf and on behalf of all of the holders of shares of beneficial interest (the "Shareholders") of defendant NJB Prime Investors (the "Trust" or "NJB"), other than those defendants herein who are shareholders of the Trust, and on behalf of and in the right of the Trust.

4. D-Z was, and continues to be a Shareholder of defendant Trust, at the time of the transactions and wrongs herein complained of, and will fairly and adequately represent the interests of the Trust and its Shareholders in the prosecution of this Action.

5. This Court has jurisdiction of this action by reason of Section 27 of the Act, 15 U.S.C. §78aa.

6. This Court also has jurisdiction of this action by reason of its diversity jurisdiction, since plaintiff is a citizen of a state other than the state of citizenship of any defendant herein, and the amount in controversy, exclusive of costs and interest, exceeds \$10,000.

Verified Complaint

7. Venue is properly laid in the Southern District of New York because the acts complained of herein occurred, in substantial part, in this judicial district.

8. In connection with the acts, conduct and other wrongs complained of herein, the defendants, directly and indirectly, used means and instrumentalities of interstate commerce and the mails.

9. This action is not brought collusively to confer jurisdiction on a court of the United States which it would not otherwise have.

THE PARTIES AND OTHER PERSONS
RELATED TO THIS ACTION

10. Plaintiff D-Z, a corporation organized and existing pursuant to the laws of the state of Delaware with its principal place of business located in Atlanta, Georgia, is the largest Shareholder of the Trust, having beneficial ownership of more than 107,000 shares (200 of which are held of record in its own name) which represents approximately 9% of Trust's issued and outstanding shares.

11. a. Defendant NJB is a real estate investment trust ("REIT") as defined by Section 856 et seq. of the Internal Revenue Code (the "Code"), created and existing pursuant to the laws of the State of Massachusetts and having its principal place of business in Clifton, New Jersey.

Verified Complaint

b. The Trust has issued transferable shares of beneficial ownership (the "Shares"), which are, and at all relevant times, have been listed and traded on the American Stock Exchange.

c. As of May 10, 1974 the Trust had 1,280,454 Shares issued and outstanding, with approximately 2,950 Shareholders of record.

d. As of November 30, 1973, the Trust owned assets totalling approximately \$98,000,000, consisting primarily of construction loans, other mortgage loans, and real estate equities.

12. a. NJB Prime Advisor (the "Advisor") is a joint venture between wholly-owned subsidiaries of Greater Jersey Bancorp ("Bancorp") and Prime Motor Inns, Inc. ("Prime"), in a ratio of 51% and 49%, respectively.

b. The Advisor's business is to provide, for pay, advisory services to the Trust pursuant to an advisory agreement (the "Advisory Agreement") with the Trust.

c. Among Advisor's duties under the Advisory Agreement for which it receives compensation from the Trust is the finding of borrowers.

d. The Advisory Agreement expires on November 30, 1974 and is renewable by NJB's trustees (the "Trustees") from year to year thereafter.

e. Although not named as a defendant herein, Ad-

Verified Complaint

visor has conspired with the named defendants and others in the commission of the wrongs herein complained of.

13. a. Bancorp is a corporation with its principal place of business in New Jersey, and owns all of the issued and outstanding shares of the New Jersey Bank, N.A. (the "Bank"), a national bank, which in turn owns 51% of the Advisor.

b. The Trust participates with the Bank in many of its mortgage and construction loans.

c. Although not named as defendants herein, Bancorp and Bank have conspired with the named defendants and others in the commission of the wrongs herein complained of.

14. a. Prime, formerly known as Prime Equities, Inc., is, and at all relevant times was, a corporation organized and existing pursuant to the laws of the State of Delaware with its principal place of business located in Clifton, New Jersey, some shares of which are owned by the public.

b. Prime is in the business of acquiring, developing, building and owning commercial and residential properties, primarily motor lodges and restaurants.

c. Through a subsidiary Prime is engaged in the business of being a mortgage broker in placing construction, development and permanent mortgage loans.

d. Through a subsidiary and/or directly Prime is a 49% owner of Advisor.

e. Prime and its subsidiaries, although not named

Verified Complaint

as defendants herein, have conspired with the named defendants and others in the commission of the wrongs herein complained of.

15. a. The other defendants are individuals who comprise the eleven Trustees of NJB, all of whom are seeking reelection in the meeting of NJB's Shareholders, now scheduled to be held on June 13, 1974, which meeting plaintiff seeks to have postponed.

b. The Trustees are fiduciaries charged with the management of the business and operations of the Trust.

c. The Trustees, their respective offices in the Trust, their respective states of citizenship and their respective affiliations with the Advisor, Bancorp, Bank and/or Prime are as follows:

<u>Name, Office Held in NJB and citizen- ship</u>	<u>Relationship to:</u>	<u>Bancorp, Bank and/or Prime</u>
	<u>Advisor</u>	
Robert E. Holloway Chairman of Board, citizen of New Jersey	Chairman of Board and Chief Executive Officer	Executive Vice President of Bank
Maurice J. Brick, Vice Chairman of Board, citizen of New Jersey	Managing Agent	President and Di- rector of Bancorp, Director and Vice Chairman of Bank
Norman Brassler, Trustee, citizen of New Jersey	None	Chairman of Board and Chief Execu- tive Officer of Bancorp and Bank

Verified Complaint

Relationship to:

Name, Office Held
in NJB and citizen-
ship

Advisor

Bancorp, Bank
and/or Prime

Melvin S. Taub,
President,
citizen of New
Jersey

President and Managing
Agent

Vice Chairman of
Board and Senior
Vice President of
Prime, owner of
321,900 shares of
Prime, 250 shares
of Bancorp and,
beneficially, of
\$125,000 of Ban-
corp convertible
capital notes

Peter E. Simon,
Vice President
citizen of New
Jersey

Chairman of Board

Chairman of Board
and President of
Prime, owner of
326,000 shares of
Prime and, bene-
ficially, \$245,000
convertible capi-
tal notes of Ban-
corp.

Charles Giller,
Trustee, citizen
of Florida

None

None

Herbert E. Harper,
Trustee, citizen
of New Jersey

None

Owner of 200 shares
of Prime

Gordon McKinley,
Trustee, citizen
of New Jersey

None

None

James R. Moseley,
III, Trustee,
citizen of Florida

None

None

Jack G. Taylor,
Trustee, citizen
of Texas

None

None

Dallas S. Townsend,
Trustee, citizen
of New Jersey

None

None

*Verified Complaint***THE CONSPIRACY, ITS
PURPOSES AND METHODS**

16. Defendants (other than the Trust on whose behalf this action is brought) have combined, confederated and conspired amongst themselves and with Bankcorp, Advisor, Bank, Prime and others (the "Co-conspirators") not presently known to plaintiff to maintain their control over the Trust in order that they may continue to benefit from self dealing with the Trust and other wrongs against the Trust, plaintiff and the Shareholders.

17. The method by which defendants and the Co-conspirators seek to maintain control over the Trust is by the reelection of defendant Trustees at an annual meeting of Shareholders now scheduled to be held on June 13, 1974.

18. In order to achieve their reelection the Trustees, on or about May 20, 1974 mailed, or caused to be mailed, from the Southern District of New York to Shareholders residing in the Southern District of New York and elsewhere certain proxy materials (the "Proxy Materials") which consist of NJB's Annual Report for 1973 (the "Annual Report"), NJB's Notice of Meeting and Proxy Statement dated May 20, 1974 (the "Proxy Statement"),

Verified Complaint

and NJB's report to shareholders for the First Quarter (ending March 1, 1974, dated May 15) (the "First Quarter Report").

19. The Proxy Materials are false and misleading in violation of the Act in the following material respects:

a. They misrepresent the operating results and financial condition of NJB;

b. They fail to make complete or adequate disclosure of the actual extent of self dealing between NJB, the Trustees who are its controlling management and affiliates of these Trustees;

c. They conceal the jeopardy to NJB which flows from such self dealing;

d. They falsely state material facts regarding certain properties; and

e. They conceal the gross neglect of the Trustees in failing to protect the Trust's cash position and real estate investments.

The Proxy Materials Materially Misrepresent
The Operating Results and Financial
Condition of NJB

20. The First Quarter Report represents that the Trust earned approximately \$577,000 for the first quarter of its 1974 fiscal year.

Verified Complaint

21. The First Quarter Report was false and fraudulent as the Trustees and Co-conspirators well knew at the time of its mailing in that, among other things, the Trust had suffered or would soon suffer losses of at least \$1,500,000 which effectively would have wiped out all of the profits included in the earnings reported therein and resulted in a substantial loss for said quarter.

The Proxy Materials Fail to Make Complete
or Adequate Disclosure of Self Dealing

22. The Proxy Materials fail to make complete or adequate disclosure of self dealing between the Trust, on the one hand, and its captors, the other defendants, Prime, Advisor and/or Bank, on the other, in that, among other things:

a. They are devoid of any information from which the Shareholders can determine whether such self dealing was fair.

b. They provide no basis upon which the Shareholders can ascertain whether the purchase prices paid by NJB for properties in which Prime, the defendants and/or the Co-conspirators were interested were fair and reasonable.

c. They provide no basis upon which the Shareholders can ascertain whether the loans by NJB on properties in

Verified Complaint

which Prime, the defendants and/or the Co-conspirators were interested were on terms fair to the Trust.

d. They provide no information from which the Shareholders can determine the fairness of the interest rates paid to the Trust by Prime, or borrowers procured by Prime or the Advisor.

e. They fail to state that more than \$1,000,000 of origination fees obtained by Prime in connection with loans by the Trust were per se unfair.

f. They fail to provide information from which the Shareholders can ascertain whether Advisor has made an adequate refund of its advisory fees after the close of NJB's 1973 fiscal year.

g. They fail to state that the Trust is entitled to a refund from Advisor of advisory fees of over \$3,800,000.

h. They fail to state that the Advisory Agreement, which is highly unfavorable to the Trust, will expire on November 30, 1974 or that it is renewable by the Trustees from year to year thereafter.

i. They fail to state whether the Trustees intend to renew the Advisory Agreement at its expiration.

Verified Complaint

The Proxy Materials Conceal the
Consequences to NJB of the Self Dealing

23. The Proxy Materials conceal the consequences to NJB of the self dealing between the Trust, on the one hand, and its captors Prime, Bank and Advisor, on the other, in that, among other things:

a. They fail to disclose that the Trust is in substantial measure dependent for its continued existence, financial stability and future prospects upon the financial stability of Prime and Prime's ability to fulfill its many obligations upon which the Trust is dependent.

b. They fail to disclose the fact that Prime is in a precarious financial condition itself and that its continued existence, financial stability and future prospects depend in substantial measure upon its ability to control the Trust in order to obtain thereby the earnings essential to its vitality.

Material Facts Concerning the Greenburgh
Transactions are Concealed

24. The Proxy Materials falsely stated material facts concerning a series of transactions involving certain property located in Greenburgh, New York, in that, among other things, the Proxy Statement represents that Prime is contingently

Verified Complaint

liable on a \$2,000,000 mortgage loan, in which the Trust has a 50% participation, when in truth and in fact as the defendants and Co-conspirators well knew when they mailed the Proxy Statement, Prime, without giving any consideration, had been fully released from all obligations on said mortgage loan to the detriment of the Trust.

The Proxy Materials Conceal Management's Gross Negligence

25. The Proxy Materials conceal the Trustees' gross negligence in mismanaging approximately \$29,000,000 of properties in which the Trust is either the lessor or mortgagee and which, because of defaults, are no longer producing income for the Trust.

26. The Proxy Materials further conceal the Trustees' failure to conserve approximately \$2,000,000 of the Trust's cash, which funds are unnecessarily being used to pay dividends when the Trust is in grave need of all possible cash.

The Foregoing Wrongs Will Result
In Immediate and Irreparable Harm
Unless Relief is Granted

27. The foregoing material misrepresentations contained in and material omissions from, the Proxy Materials

effectively disenfranchise NJB's nearly 3000 Shareholders by depriving them of information critical to their voting judgment in connection with the election of the Trustees to manage their substantial investments.

28. Plaintiff, the Shareholders and the Trust have no prompt or adequate remedy at law.

29. In light of defendants' refusal to provide plaintiff with a list of the Trust's Shareholders until compelled to by the Massachusetts state courts, or to provide any meaningful information concerning the affairs of the Trust, and in light of the domination and control that defendants and the Co-conspirators have exercised, and continue to exercise over the affairs of the Trust, it would be a meaningless and fruitless exercise for plaintiff to make any further requests or demands of defendants.

WHEREFORE, plaintiff demands judgment:

A. Preliminarily and permanently enjoining defendants, their servants, agents and employees and all persons acting through or under them, from using or noting any proxies obtained pursuant to the proxy materials mailed to the Shareholders of NJB on or about May 20, 1974;

Verified Complaint

B. Postponing or adjourning the annual meeting of Shareholders of NJB now scheduled for June 13, 1974 pending the determination of this action.

C. Directing that defendants set a new annual meeting date for NJB Shareholders, not less than 35 nor more than 60 days from the date of the Court's final order, to permit solicitation of proxies by plaintiff in compliance with the rules and regulations of the Securities and Exchange Commission;

D. Directing that defendants set a new record date for said new or postponed annual meeting, and, immediately after the names of the Shareholders at such new record date are known, furnish and deliver to plaintiff a shareholders list of NJB as of such new record date;

E. Directing that defendants, if they are candidates for election as Trustees at said new or postponed annual meeting of NJB, furnish to each person from whom they solicit proxies new proxy materials correcting the false and misleading statements contained in their proxy materials;

F. Directing that any new proxy soliciting materials issued by defendants, or any of them, must state that it is

Verified Complaint

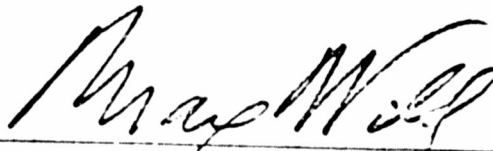
issued as a result of this Court's order to correct false and misleading statements in defendants' proxy materials;

G. Restricting defendants, including NJB, from issuing any additional shares to any person, except in compliance with commitments or agreements for such issuance disclosed in NJB's Annual Report for its fiscal year ended November 30, 1973 or with the consent of this Court; and

H. Granting plaintiff the costs and disbursements of this action, including reasonable attorneys fees, and such other, further and different relief as this Court may deem just and proper.

RUBIN WACHTEL BAUM & LEVIN

By



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PRECISION ON MOTION FOR PRELIMINARY INJUNCTION

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[194,588] D-Z Investment Company v. Holloway, et al.

United States District Court, Southern District of New York. No. 74 Civ. 2379.
June 11, 1974. Opinion in full text.

Exchange Act—Section 14(a)—Proxy Solicitation Materials—Alleged Misrepresentations—Injunctive Relief Denied.—A request for an injunction by the plaintiff investment company, whose shares in the defendant issuer are the plaintiff's only assets, is denied since the balance of hardships is not in the plaintiff's favor and there has been no showing of the possibility of irreparable damage. Plaintiff claims that the proxy materials of the defendant issuer misrepresent its operating results and financial condition and fail to disclose the extent of self-dealing between the defendant, its controlling management, and affiliates. The plaintiff has failed to show clear and convincing evidence that there is a likelihood of success in this lawsuit so as to justify injunctive relief. In addition, the plaintiff did not commence this action for injunctive relief until ten days before the scheduled shareholders meeting, and this delay before seeking such extraordinary injunctive relief in itself justifies denial of the motion.

See ¶ 24,001, "Exchange Act—Proxies" division, Volume 2

OPINION AND ORDER

CANNELLA, District Judge: Plaintiff's motion for a preliminary injunction, Fed. R. Civ. P. 65 (a), (a) enjoining the defendants, their servants, agents and employees and all persons acting through or under them, from using or voting any proxies obtained pursuant to the proxy soliciting materials mailed to the shareholders of NJB Prime Investors on or about May 20, 1974; and (b) adjourning or postponing the annual meeting of shareholders of NJB Prime Investors now scheduled for June 13, 1974 pending the determination of this action, is denied.

Plaintiff commenced the instant action on June 3, 1974 alleging that the defendants had violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a),¹ and the proxy rules promulgated by the Commission thereunder,² in connection with certain proxy solicitation materials mailed to the shareholders of NJB Prime Investors [hereinafter "NJB" or the "TRUST"] on or about May 20, 1974. The matter was

assigned to Judge Wyatt for all purposes, pursuant to the calendar rules of this Court. On that same day, by order of this court, plaintiff brought on the instant motion for injunctive relief. Judge Wyatt made the motion returnable before him at 2:30 P.M. on Friday, June 7, 1974. At 4:10 P.M. of that day the motion was referred to this Court, sitting in the emergency part, since another case before Judge Wyatt was still in progress.

On the present motion, plaintiff seeks that the court exercise its discretion in favor of the injunctive relief sought. The standards governing the exercise of such discretion are well settled in this Circuit and, just last week, Judge Mulligan had opportunity to restate them in the following terms:

The standard which governs the trial court in the determination of whether or not a preliminary injunction should issue is whether or not the moving party has carried the burden of clearly demonstrating a combination of either probable success

¹ Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), provides:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempt security) registered pursuant to Section 781 [12] of this title.

It is now clear beyond cavil that Section 14(a) gives rise to an implied private cause of action in favor of shareholders who seek to remedy violations of its provisions. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

² The applicable rule of the Securities and Exchange Commission promulgated pursuant to the authority of Section 14(a), Rule 14a-9 (a), states:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication written or oral, containing any statement which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

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on the merits and the possibility of irreparable damage, or the existence of serious questions going to the merits and the tipping of the balance of hardships sharply in its favor. [Emphasis added]

American Brands, Inc. v. Playgirl, Inc., — F. 2d —, No. 74-1357 (2d Cir. June 3, 1974 at p. 3918). Further citation of authority is not here necessary and, as is evidenced by the succeeding paragraphs, plaintiff has plainly failed to sustain the heavy duty burden which is incumbent upon it as a predicate for the issuance of this extraordinary remedy.

Plaintiff, D-Z Investment Company, is a recently formed Delaware corporation owning approximately 9% of the outstanding shares of beneficial interest in the TRUST. Apparently, these shares are the plaintiff's only assets and all have been purchased in the period between April 19, 1974 and the present. Plaintiff's avowed purpose in securing these NJB shares is to "acquire a sufficient ownership interest in NJB to influence management decisions and, ultimately, to determine the management and policies of NJB." Defendant NJB is a real estate investment trust organized under Massachusetts Law. Its primary purpose is to make investments in real estate development projects and to participate in real estate financing. The individual defendants herein are the trustees and officers of NJB. Thus, although plaintiff marches into court carrying banners of corporate democracy, it is more than obvious that the action at bar is part of an intracorporate power struggle, with plaintiff's aim being the ouster of the TRUST's present manage-

ment and the replacement of it by plaintiff and its nominees.

In support of its application for injunctive relief, plaintiff asserts that NJB has violated the "proxy rules" by virtue of certain misrepresentations or omissions in five general categories of information set forth in or omitted from the May 29, 1974 solicitation materials;² specifically that:

- (a) [The proxy materials] misrepresent the operating results and financial condition of NJB;
- (b) They fail to make complete or adequate disclosure of the actual extent of self-dealing between NJB, the Trustees who are its controlling management and affiliates of these Trustees;
- (c) They conceal the propriety to NJB which follows from such self-dealing;
- (d) They falsely state the facts regarding certain properties; and
- (e) They conceal the gross neglect of the Trustee in failing to protect the capital Trust's cash position and real estate investments.

As is incumbent upon it on a motion of the instant nature, the Court next turns to the specifics of each of these allegations.

THE FACTS

It is claimed by plaintiff that only two days after the mailing of the involved proxy materials to the shareholders, NJB, on May 22, 1974, released an announcement which was carried on the "Broad Tape", stating that the TRUST had ceased to accrue interest on some \$10.8 million in loans on which interest had not been paid for a period in excess of 90 days. There is no dispute between the parties that this non-

² Schedule 13D dated May 3, 1974 filed by plaintiff with the Securities and Exchange Commission at 3.

³ Plaintiff, by letter of its counsel to the Court dated June 10, 1974, has raised an additional and entirely new alleged violation of the proxy rules by defendants.

We are constrained to call to Your Honor's attention an additional serious violation of the Federal proxy rules on the part of the defendants, revealed for the first time in defendants' opposing papers served on us just before argument.

Defendant Holloway, the Trust's Chief Executive Officer, admits that the Trust "has already incurred many thousands of dollars of expenses in connection with its annual meeting, including fees to professional proxy solicitors." (Holloway Affidavit p. 16, ¶ 29). The Proxy Statement makes absolutely no disclosure that the Trust has engaged professional proxy solicitors (plaintiff's moving affidavit of Bruce R. Davis, Exhibit D).

This non-disclosure is a clear violation of the express requirements of Item 3(a)(3) of

Schedule 14A to the SEC's Proxy Rules, which provides:

"(3) If the solicitation is to be made otherwise than by the use of the mails, describe the methods to be employed. If the solicitation is to be made by specially engaged employees or paid solicitors, state (a) the material features of any contract or arrangement for such solicitation and identify the parties, and (b) the cost or anticipated cost thereof."

All of this information is required to be included in the Proxy Statement (SEC Rule 14a-3). This violation alone mandates a preliminary injunction.

This claim is, however, totally without basis in fact, as is evidenced by the TRUST's letter to its shareholders dated May 31, 1974, which states, *inter alia*:

Supplemental information: The Trust has retained D. F. King & Co., Inc. to aid in the solicitation of proxies at a fee of \$5,000 plus reasonable out-of-pocket expenses.

- Davis affidavit at ¶ 3.

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accrual is the fact, however, the consequences flowing therefrom are subject to heated debate. Plaintiff contends that the nonaccrual of interest on these loans means (1) the TRUST will suffer losses based upon the amount of the overdue loans and, therefore, should establish sufficient reserves against such losses, which plaintiff alleges it has not done, and (2) that these losses will "wipe out" the earnings disclosed in the First Quarter Report of some \$577,196 and, in fact, create a loss to the TRUST of nearly \$1 million. Defendants, on the other hand, assert that this nonaccrual is but a standard accounting procedure employed by the TRUST and that management fully expects the loans to be paid in full, both as to principal and interest, before the close of the current fiscal year. The Trustees, therefore, state that no loss reserves are necessary with regard to these loans (beyond those already established) and that first-quarter earnings will not be dissipated as a result of this nonaccrual.

In addition, the proxy materials, particularly the First Quarter Report, fully disclose to the shareholders that the TRUST was not accruing interest on 20% of its loan portfolio as of the end of the first quarter. The inclusion of the loans discussed in the May 22 release in this computation only increases the figure to 23% of the total portfolio and, in the opinion of this Court, any nondisclosure which might exist in this regard would be insufficient to satisfy the materiality requirement inherent in the present claim.⁶

It is next contended by plaintiff that the proxy materials fail to make complete and adequate disclosure of the Trustees' self-dealing. Plaintiff contends that an incestuous relationship exists between the TRUST, its Trustees, its advisor, Prime Motor Inns, Inc. [hereinafter "Prime"] and the New Jersey Bank, and that this relationship has not been fully disclosed to the shareholders. In this regard, the proxy materials speak for themselves. They fully disclose the

various interrelationships between certain of the Trustees and Officers of the TRUST and the advisor, Prime and the Bank. The Annual Report plainly states that the agreement between the TRUST and the advisor is to expire, by its terms, on November 30, 1974 and will, thereafter, be subject to renewal. For purposes of the instant motion, the Court finds that plaintiff infers from its awareness of the fact that several of the Trustees and Officers of the TRUST wear official hats in one or more of the other above-mentioned entities that self-dealing between these entities must exist. Plaintiff, however, has failed to offer any concrete proof thereof.

The third alleged violation asserted by plaintiff is that the proxy materials fail to reveal to the shareholders the jeopardy into which the TRUST has been placed as a consequence of the Trustees' self-dealing. The essence of this charge may be summarized as follows: the TRUST has hitched a tow line onto the financial fortunes of Prime and those financial fortunes are rapidly failing; Prime will soon sink into the depths of the financial sea, taking the TRUST down along with it; and management has not disclosed the true financial condition of Prime to the TRUST's shareholders. Defendants, on the other hand, contend that such is not the case at all, and have, by affidavit, put forth the following state of facts: (1) The relationship between the TRUST and Prime has resulted in a substantial benefit to the TRUST; (2) Prime and its predecessors have never defaulted on any of their obligations to the TRUST or to any other lending institution; (3) the fees paid by the TRUST to Prime for brokerage and other services are reasonable and are within the authorization of the Declaration of Trust; and (4) the financial position of Prime is not on the verge of imminent collapse but remains strong, as is disclosed by its most recent Annual Report. The position asserted by

⁶ The test of materiality, as applied to situations such as that at bar, has been variously defined:

Where the misstatement or omission in a proxy statement has been shown to be "material" . . . that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote.

Mills v. Electric Auto-Lite Co., supra, 396 U. S. at 384. Alternatively, the Court of Appeals for this Circuit has stated:

The test, we suppose, is whether, taking a properly realistic view, there is a substantial likelihood that the misstatement or omission may have led a stockholder to grant a proxy to the solicitor or to withhold one from the other side, whereas in the absence of this he would have taken a contrary course.

General Time Corp. v. Talley Industries, Inc., 403 F. 2d 159, 162 (2 Cir. 1968), cert. denied, 393 U. S. 1026 (1969). See also, *Gerstle v. Gamble-Skogmo*, 478 F. 2d 1281, 1301-1302 (2d Cir. 1973).

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defendants appears to be borne out by the relevant documents.

The fourth area of misinformation allegedly contained in the proxy materials is that they falsely state facts regarding certain properties upon which the TRUST has issued loans, specifically certain property located in Greenburgh, New York. Plaintiff asserts that NJB's Annual Report contains a "big lie" when it states that Prime remains contingently liable on a loan involving the Greenburg property when, in fact, Prime no longer is. However, an examination of the Annual Report reveals that the statement therein made with regard to Prime's contingent liability relates to the close of the TRUST's last fiscal year, November 30, 1973, and that it accurately reflects the facts then extant. It is true, as plaintiff contends, that at the time the proxy materials were mailed to the shareholders in May, Prime was no longer contingently liable on the loan. It is equally true, however, that, at that point in time, NJB had been fully repaid on the loan, thereby mooted any question of Prime's contingent liability or, indeed, any question going to the loan itself.

Lastly, plaintiff alleges gross negligence on the part of the Trustees in the management of the TRUST's real estate investments and cash position and assert that this negligence has not been revealed to the shareholders. This broad charge incorporates several subcharges of alleged nondisclosure or misrepresentation in the proxy materials, two of which warrant discussion here. First, plaintiff claims that some of the real estate projects being financed by the TRUST do not have adequate site security to protect them against vandalism. Plaintiff's basis for this charge is a so-called "expert's report", however, plaintiff has neither disclosed the name of its expert nor the nature of his expertise. Such speculative and hearsay proclamations are, aside from their truth or falsity, insufficient to warrant consideration on a motion for the drastic relief here sought.

Plaintiff also asserts that the Trustees' failure to pursue allegedly viable alternatives to the \$2 million cash dividend distribution selected by them and their failure to seek out other possible cash deductions, all of which, it is stated, would conserve

NJB's cash position, were not disclosed to the TRUST's shareholders. The Court does not dignify this contention by any extended discussion. In essence, this allegation resolves itself into the following: If D-Z were running the TRUST, D-Z would have done thus and so and D-Z would have acted differently than the present management. Indeed, the Court is convinced that if there comes a time when plaintiff, in fact, gains control of the TRUST it will do things differently. However, in the present status of this litigation, the Court will not delve into the propriety of certain decisions made by the TRUST's present management, which, on the basis of the affidavits submitted on behalf of the defendants, appear to be fully justified by sufficient business reasons.

DISCUSSION

As was earlier stated, in order for plaintiff to prevail on the instant motion it must satisfy at least one of the accepted standards for preliminary injunctive relief, namely, either (1) probable success on the merits and the possibility of irreparable damage; or (2) the existence of serious questions going to the merits and the tipping of the balance of hardships sharply in its favor,⁷ and it must do so by clear and convincing proof. See, e.g., *Twentieth Century Fox Film Corp. v. Lewis*, 334 F. Supp. 1398, 1399-1400 (S. D. N. Y. 1971); *Abramson v. Nitronics, Inc.*, 312 F. Supp. 519, 523-24 (S. D. N. Y. 1970) (Mansfield, J.); *Hambros Bank, Ltd. v. Meserole*, 287 F. Supp. 69, 71 (S. D. N. Y. 1968); *Sherman v. Posner*, 266 F. Supp. 871, 873 (S. D. N. Y. 1966); *Kuader v. United Bank*; *Carton Corp.*, 199 F. Supp. 420, 425 (S. D. N. Y. 1961) (Feinberg, J.); *Dunn v. Decca Records, Inc.*, 120 F. Supp. 1, 3 (S. D. N. Y. 1954) (Irving R. Kaufman, J.). As this Court had opportunity to state on an earlier, similar application:

As another member of this court noted on an earlier occasion in response to a similar motion for a preliminary injunction to enjoin the distribution of an allegedly false and misleading proxy statement, "courts are in agreement that the issuance of an injunction even after trial is an unusual remedy. Upon a motion for a temporary injunction, a fortiori, there should be a greater reluctance to exercise this drastic power."

⁷ Defendant, on the instant motion, asserts that the second test for preliminary injunctive relief, as set forth above, is inapplicable to a situation of the nature here presented. How-

ever, since the Court is of the opinion that plaintiff is not entitled to the relief it here seeks under either standard, this objection is moot.

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Sherman v. Posner, *supra*, 266 F. Supp. at 873, quoting from, *Kauder v. United Board & Carton Corp.*, *supra*, 199 F. Supp. at 423. On the record presently before it, the Court is of the opinion that plaintiff has failed to satisfy its burden of proof.

As the facts of this case, as discussed above, tend to indicate, plaintiff has failed, in connection with the instant motion, to demonstrate the probability of its success on the merits of this law suit. Clear and convincing proof of the likelihood of such success is plainly wanting, and, indeed, in the opinion of this Court, the probability of plaintiff's ultimate success is, on the present record, quite remote. See, e.g., *Twentieth Century Fox Film Corp. v. Lewis*, *supra*, 334 F. Supp. at 1401-1402.* In a similar vein, the Court is not persuaded by the proof at bar that plaintiff has raised serious questions going to the merits of this litigation. The rules of law applicable to an action of the instant nature have, of late, become reasonably well settled and, the application of those principles to the instant dispute do not give rise to serious or substantial questions on the merits.

The Court does not intend, however, by what is stated above, to rule upon the merits of this litigation. Rather, it must and it does defer their resolution to a plenary trial before the assigned judge. The instant motion came before this Court with a sense of urgency attached to it and it is with great dispatch that this Court has considered the factual contentions of the parties. The Court, therefore, may well have overlooked factual matters which plaintiff considers significant to its claim under the proxy rules. However, any comment which the Court makes with regard to the facts of this litigation is, in the context of the present motion, almost wholly irrelevant, owing to the fact that plaintiff has clearly failed to satisfy the second element of either of the applicable injunctive standards.

In order to secure the relief it now seeks, plaintiff is required to demonstrate either

the possibility of irreparable harm or that the balance of hardships tips sharply in its favor. Traditionally, courts of equity, in considering and fashioning equitable relief, have engaged in a balancing of the equities and hardships between the parties, and this Court does so here. The principle thrust of the instant motion is to enjoin the shareholders meeting now scheduled for June 13, 1974 and the equities of such injunction must, therefore, be investigated by the Court.

Courts of this District and elsewhere have long recognized that to allow an annual meeting to proceed in the face of alleged misrepresentations and omissions in the proxy materials does not, of itself, work irreparable injury or yield unremediable consequences upon the party seeking its postponement. As this Court has earlier stated:

In addition, this court does not recognize an unremediable injury which will inure to the plaintiff by the denial of his motion at this time. If, after a full hearing, a court did determine that the proxies herein were, in fact, unlawfully obtained and utilized, there is sufficient authority in this District which would permit the setting aside of the [results of the annual meeting] and a re-solicitation to be had with a new vote held thereon.

Sherman v. Posner, *supra*, 366 F. Supp. at 873-874. See also, *McConnell v. Lucht*, 320 F. Supp. 1162, 1166 (S. D. N. Y. 1970); *Elgin National Industries, Inc. v. Chemetron Corp.*, 299 F. Supp. 367, 374 (D. Del. 1969); *Kauder v. United Board & Carton Corp.*, *supra*, 199 F. Supp. at 424; *Mack v. Mishkin*, 172 F. Supp. 885, 889 (S. D. N. Y. 1959).

Additionally, and in balancing the hardships, the Court finds that the equities of the present situation tip decidedly in defendants' favor, rather than that of the plaintiff. If a preliminary injunction were to issue, no matter how such was explained to the shareholders by the present management, a substantial number of shareholders would regard its issuance as a de-

* An additional criteria recognized by the courts in evaluating a movant's probability of ultimate success on the merits in a case of the instant nature is the inaction or approval of the Securities and Exchange Commission with regard to the challenged proxy materials. See, e.g., *General Time Corp. v. Tally Industries, Inc.*, *supra*, 403 F.2d at 163; *McConnell v. Lucht*, *supra*, 320 F. Supp. at 1166; *Abramson v. Nutronics, Inc.*, *supra*, 312 F. Supp. at 526; *Sherman v. Posner*, *supra*, 266 F. Supp. at 874; *Kauder v. United Board & Carton Corp.*, *supra*, 199 F. Supp. at 423-424; *Mack v. Mishkin*, *supra*, 172 F. Supp. at 888-889; *But see*,

J. I. Case Co. v. Borak, *supra*, 377 U.S. at 432. This, despite the Commission's Rule 14a-9(b), which states:

The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

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termination of the alleged Securities Act violations on the merits and a finding that the incumbent management had acted improperly with regard to the TRUST. Again, as this Court had opportunity to state in *Sherman v. Posner*, *supra*:

Conversely, if the preliminary injunction were granted at this time irreparable injury would accrue to the defendants. Beyond a peradventure, the issuance of an injunction would come to the attention of the stockholders. . . . And no matter how clearly it was indicated otherwise, the issuance of the injunction undoubtedly would be viewed by some as a favorable adjudication of the claims of the plaintiff. This would be tantamount to a determination of wrongdoing on the part of the [present] management. *Just how this result could be remedied in the event it was found at a full hearing that the claims of the plaintiff were unfounded is not readily perceptible to this Court* [emphasis added].

266 F. Supp. at 874. See also, *Twentieth Century Fox Film Corp. v. Lewis*, *supra*, 334 F. Supp. at 1402-1403; *Elgin National Industries, Inc. v. Chemetron Corp.*, *supra*, 299 F. Supp. at 374; *General Time Corp. v. Talley Industries, Inc.*, 283 F. Supp. 832, 837 (S. D. N. Y.), *aff'd*, 403 F. 2d 159, 162 (2 Cir. 1968), *cert. denied*, 393 U. S. 1026 (1969); *Kauder v. United Board & Carton Corp.*, *supra*, 199 F. Supp. at 424; *Mack v. Mishkin*, *supra*, 172 F. Supp. at 889. It is clear, on the record presently before the Court, that the harm which is likely to be suffered by the defendants if the injunction is issued and is ultimately proved unwarranted, far outweighs the possible harm to plaintiff if the preliminary injunction is erroneously denied at this time. Therefore, in accordance with the accepted standards for the issuance of preliminary injunctive relief, plaintiff's motion is denied.

One additional, and equally dispositive ground for the denial of the relief here sought was made clear by Judge Weinfeld in *McConnell v. Lucht*, *supra*, 320 F. Supp. at 1166, wherein he stated:

[E]ntirely apart from lack of compelling support for plaintiffs' claim for the extraordinary preliminary injunctive relief

they seek, other factors warrant denial of their motion. There has been extreme delay in the presentation of this application for preliminary injunctive relief, made at the "zero hour" preceding the meeting. No adequate excuse appears for this last minute attempt to stay the regularly scheduled meeting, which would serve to disrupt normal conduct of corporate affairs and injure the corporation, and where there has been no adequate showing of irreparable injury to plaintiff if the meeting proceeds. . . . [Plaintiffs] had demanded and received a stockholders list by October 9 and were apparently then ready to embark upon the formation of their committee. . . . The challenge by plaintiff to management's proposal was sent to stockholders on November 7, sixteen days after management's notice which contained the material plaintiffs allege violates the proxy Rule. Plaintiffs, however, took no action to stay a meeting at that point, but waited until four days before it was scheduled to seek the extraordinary injunctive relief. Their failure to act alone justifies the denial of the motion. [Footnotes omitted]

Similarly, the present plaintiff succeeded in obtaining a list of NJB shareholders on May 17, 1974. Thereafter, the now-disputed proxy materials were mailed to the shareholders on May 20, 1974. Plaintiff did not, however, commence this action or seek injunctive relief until June 3, 1974, two weeks after the proxy solicitation materials were mailed and only ten days before the scheduled meeting. The instant motion did not come on to be heard until the late afternoon of June 7, 1974, only three business days before the scheduled annual meeting. Indeed, plaintiff, on June 10, raised an entirely new ground in support of its application.* Needless to say, this Court, on these facts, is in complete accord with the sentiments expressed by Judge Weinfeld.

Conclusion

Accordingly, and for all of the reasons above stated, plaintiff's motion for a preliminary injunction, Fed. R. Civ. P. 65(a), is denied.

So ordered.

* See, note 4, *supra*.

ANSWER AND COUNTERCLAIMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

D-Z INVESTMENT COMPANY, :

Plaintiff, :

-against- :

ROBERT E. HOLLOWAY, MELVIN S. TAUB, :
MAURICE J. BRICK, PETER E. SIMON, :
NORMAN BRASSLER, CHARLES GILLER, :
HERBERT E. HARPER, DR. GORDON MCKINLEY, :
JAMES R. MOSELEY, III, JACK G. TAYLOR, : 74 Civ. 2379 (I.B.W.)
DALLAS S. TOWNSEND, JR. and NJB PRIME :
INVESTORS, :

Defendants, : ANSWER AND
COUNTERCLAIMS

-and- :

SECURITY MANAGEMENT CO., INC., CANTOR, :
FITZGERALD & CO., INC., BRUCE R. DAVIS, :
JEROME ZIMMERMAN, RALPH M. BECKER, SAUL :
BECKER, BERNARD KROLL, MAX SOPHIER, HAROLD :
LEVOW, HAROLD B. LEVIN, HARVEY JACOBSON, :
SEYMOUR WEINBERG and RONALD D. FEINMAN, :
Additional Defendants :
to Counterclaims. :

-----x

Defendants Robert E. Holloway, Melvin S. Taub, Maurice
J. Brick, Peter E. Simon, Norman Brassler, Charles Giller,
Herbert E. Harper, Dr. Gordon McKinley, James R. Moseley, III,
Jack G. Taylor and Dallas S. Townsend, Jr. by their attorneys,
Wachtell, Lipton, Rosen & Katz, for their answer to the complaint,
upon information and belief:

1. Deny the allegations of paragraphs 1, 2, 3, 4, 5,
7, 8, 12(a), 12(b), 12(c), 12(e), 13(c), 14(a), 14(b), 14(e),

Answer and Counterclaims

15, 16, 17, 18, 19(a-c), 21, 22(a-f), 23(a-b), 24, 25, 26, 27, 28 and 29 of the complaint.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6 and 9.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the complaint except admit that plaintiff is the record holder of 200 shares of NJB.

4. Admit the allegations of paragraph 11 but deny that the principal place of business of NJB is in Clifton, New Jersey.

FOR A FIRST AFFIRMATIVE DEFENSE

5. The complaint fails to state a claim upon which relief can be granted.

FOR A SECOND AFFIRMATIVE DEFENSE

6. This Court lacks subject matter jurisdiction over the claims alleged in the complaint.

FOR A THIRD AFFIRMATIVE DEFENSE

7. The complaint fails to allege with particularity the efforts, if any, made by plaintiff to obtain the action it

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desires from the Board of Trustees and/or the reasons for its failure to obtain the action or for not making the effort.

FOR A FOURTH AFFIRMATIVE DEFENSE

8. Plaintiff has failed to make a demand upon the Board of Trustees to commence this action as is required under Massachusetts law and the Federal Rules of Civil Procedure.

FOR A FIFTH AFFIRMATIVE DEFENSE

9. Plaintiff lacks standing to maintain this action as a derivative action under the Federal Rules of Civil Procedure.

FOR A SIXTH AFFIRMATIVE DEFENSE

10. Plaintiff is not the proper party to maintain a derivative action on behalf of NJB and does not fairly and adequately represent the interests of the shareholders in enforcing any right of NJB.

FOR A SEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff is estopped by virtue of its unclean hands from maintaining this action.

*Answer and Counterclaims*FOR AN EIGHTH AFFIRMATIVE DEFENSE

12. This action does not present a justiciable controversy in that events occurring subsequent to the commencement of this action have rendered the claims alleged in the complaint moot.

FOR A NINTH AFFIRMATIVE DEFENSE

13. This Court lacks jurisdiction over the persons of defendants Charles Giller, James R. Moseley, III, and Jack G. Taylor.

FOR A TENTH AFFIRMATIVE DEFENSE

14. Venue as to defendants Charles Giller, James R. Moseley, III, and Jack G. Taylor in this action is not properly in this Court.

AS AND FOR COUNTERCLAIMS AGAINST
PLAINTIFF AND ADDITIONAL DEFENDANTS

15. The jurisdiction and venue of this Court over the counterclaims herein are founded upon 15 U.S.C. Sections 1331(a) and 1337 and Section 27 of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. Section 78(aa) as well as on the purported jurisdictional basis of plaintiff's claims. The counterclaims herein arise pursuant to Sections 7, 10(b),

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13(d), 14(a), 14(d) and 14(e) of the 1934 Act and the rules and regulations promulgated thereunder, 15 U.S.C. Sections 78g, 78j(b), 78m(d), 78n(a), 78n(d) and 78n(e), Section 5 of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. Section 77(e), and Section 7 of the Investment Company Act of 1940 (the "1940 Act"), 15 U.S.C. Section 80a-7. Acts and transactions complained of have occurred in this District. The matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs.

THE PARTIES TO THE COUNTERCLAIMS

16. NJB Prime Investors ("NJB") is a real estate investment trust ("REIT") organized pursuant to the laws of the Commonwealth of Massachusetts under a Declaration of Trust, dated June 16, 1971. The purpose of NJB, as set forth in the Declaration of Trust, is to invest in real estate equities and mortgages so as to qualify as a REIT under the applicable provisions of the Internal Revenue Code. Since its business operations commenced on December 1, 1971 the Trust has invested in a diversified portfolio of construction, development, intermediate and long-term mortgage loans and real estate equities, including purchase-leaseback and related transactions. Funds for these investments have been raised through public offerings of the Trust's securities and by bank borrowings. As of May 10, 1974, NJB had 1,280,454 shares of beneficial interest outstanding which are listed on the American Stock Exchange (the "Exchange") and are

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registered pursuant to Section 12 of the 1934 Act. As of the time of the filing of this answer and counterclaims, the book value of NJB's shares exceeded their market value on the Exchange.

17. Defendants Robert E. Holloway, Melvin S. Taub, Maurice J. Brick, Peter E. Simon, Norman Brassler, Charles Giller, Herbert E. Harper, Dr. Gordon McKinley, James R. Moseley, III, Jack G. Taylor, and Dallas S. Townsend, Jr., are and at all times relevant herein have been the duly elected Trustees of NJB, invested with all the powers and responsibilities set forth in the aforesaid Declaration of Trust and otherwise conferred by law. Said defendants are hereinafter sometimes collectively referred to as the "Trustees". The counterclaims herein set forth are asserted by the Trustees on their own behalf, for and on behalf of and in the right of NJB and on behalf of all shareholders of NJB other than plaintiff D-Z and those acting in concert with D-Z.

18. Plaintiff D-Z Investment Company ("D-Z") is a Delaware corporation having its principal place of business at 420 14th Street, N.W., Atlanta, Georgia, and was formed on April 23, 1974 for the specific purpose of purchasing control of NJB.

19. Additional defendant to counterclaims Security Management Co., Inc. ("Security") is a Georgia corporation having its principal place of business at 420 14th Street, N.W., Atlanta, Georgia and is engaged in real estate development and management, apartment and condominium construction and the sale of land.

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Security is a controlling shareholder of D-Z and a purchaser of notes issued by D-Z as is more fully set forth hereinafter.

20. Additional defendant to counterclaims Cantor, Fitzgerald & Co., Inc. ("Cantor Fitzgerald") is a block trading specialist and a dealer in securities, registered with the National Association of Securities Dealers, with a place of business within this District at 1345 Avenue of the Americas, New York, New York.

21. Additional defendant to counterclaims Bruce R. Davis ("Davis") is the president and director of D-Z, the chairman of the board of Security and resides at 4332 Conway Valley Court, N.W., Atlanta, Georgia.

22. Additional defendant to counterclaims Jerome Zimmerman ("Zimmerman") is a vice president and director and a controlling shareholder of D-Z, is a purchaser of notes issued by D-Z as is more fully set forth hereinafter and resides at 3144 Wood Valley Road, N.W., Atlanta, Georgia.

23. Additional defendant to counterclaims Ralph M. Becker ("R. Becker") is the treasurer, secretary and director of D-Z and president of Security and resides at 23 Old Ivy Square, Atlanta, Georgia.

24. Additional defendant to counterclaims Saul Becker ("S. Becker") is a vice president and director of

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D-Z and director of Security and resides at 3380 Valley Road, N.W., Atlanta, Georgia.

25. Additional defendant to counterclaims Bernard Kroll ("Kroll") is a purchaser of notes issued by D-Z as is more fully set forth hereinafter and has an address at 400 Colon Square, Atlanta, Georgia.

26. Additional defendant to counterclaims Max Sophier ("Sophier") is a purchaser of notes issued by D-Z as is more fully set forth hereinafter, and has an address at 2575 Peachtree Street, N.E., Atlanta, Georgia.

27. Additional defendant to counterclaims Harold Levow ("Levow") is a purchaser of notes issued by D-Z as is more fully set forth hereinafter, and has an address at 1235 Mt. Paran Road, N.W., Atlanta, Georgia.

28. Additional defendant to counterclaims Harold B. Levin ("Levin") is a purchaser of notes issued by D-Z as is more fully set forth hereinafter, and has an address at 1293 Peachtree Street, N.E., Atlanta, Georgia.

29. Additional defendant to counterclaims Harvey Jacobson ("Jacobson") is a purchaser of notes issued by D-Z as is more fully set forth hereinafter, and has an address at 3236 East Wood Valley Road, N.W., Atlanta, Georgia.

30. Additional defendant to counterclaims Seymour

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Weinberg ("Weinberg") is a purchaser of notes issued by D-Z as is more fully set forth hereinafter, and has an address at Old Ivy Road, N.E., Atlanta, Georgia.

31. Additional defendant to counterclaims Ronald D. Feinman ("Feinman") is a purchaser of notes issued by D-Z as is more fully set forth hereinafter, and has an address at 5310 London Drive, N.W., Atlanta, Georgia.

32. The additional defendants to the counterclaims are collectively referred to hereinafter as "the additional defendants."

THE CONSPIRACY, ITS OBJECTIVES
AND ACTS IN FURTHERANCE THEREOF

33. Commencing sometime prior to April 19, 1974, D-Z and the additional defendants entered into a plan, combination and conspiracy to acquire shares of NJB directly and to join with each other and with other persons, firms and entities, the identities of which are presently unknown to NJB, in acquiring shares of NJB with the aim of obtaining control of NJB for their private gain by the use of illegal, improper, deceptive and fraudulent acts and practices in violation of the provisions of the 1933 Act, the 1934 Act and the 1940 Act. The additional defendants were instrumental in causing D-Z to commit the illegal acts set forth below and participated in such acts as hereinafter alleged.

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34. In implementing the plan, combination and conspiracy, D-Z and the additional defendants made use, directly or indirectly, of the means and instrumentalities of interstate commerce and the mails.

35. D-Z and the additional defendants have implemented and continue to implement their plan to take over control of NJB by, among other things: (i) filing and disseminating a false and misleading Schedule 13D and amendments thereto with the Securities and Exchange Commission (the "Commission"), the Exchange and NJB; (ii) purchasing on the Exchange and in other transactions substantial amounts of NJB's shares while concealing the true purpose of such purchases and otherwise fraudulently withholding material information from NJB's shareholders and the investing public in connection with such purchases; and (iii) soliciting the proxies, consents and authorization of NJB shareholders without first filing the information required by the 1934 Act and without disclosure of their plans and purposes and other material information.

36. D-Z and the additional defendants' plan, combination and conspiracy had and has as its objective the take-over of control of NJB and its assets for the purpose of making use of NJB's assets for their personal gain by gaining control of NJB's real estate assets and making use of those assets in connection with the business of D-Z and Security to the detriment of NJB's shareholders who have invested in NJB for, among other

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reasons, the advantages of being a shareholder in a REIT. The actions of D-Z and the additional defendants threaten and will continue to threaten the REIT status of NJB under the applicable provisions of the Internal Revenue Code, all to the detriment of NJB and its shareholders. Moreover, the acquisition of control was to be, and is being, accomplished by use of illegal means, including failing to disclose the fact that the acquisition of such control would be illegal, all as detailed below.

37. As is more particularly set forth hereinafter, in furtherance of and pursuant to the aforesaid illegal plan, during the period April 19, 1974 through July 8, 1974, D-Z purchased a total of 158,500 shares of NJB which constitutes in excess of 12% of NJB's outstanding shares; and, since July 8, 1974 D-Z has continued to acquire and attempt to acquire additional shares of NJB. The acquisition of said shares was and is illegal in that, among other things, it:

A. Violates the margin requirements of Section 7 of the 1934 Act and of the Board of Governors of the Federal Reserve System;

B. Violates provisions of the Investment Company Act of 1940, and particularly, Section 7 thereof; and

C. Violates the "tender offer" provisions of the 1934 Act, and particularly, Section 14(d) thereof.

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38. Moreover, the Schedule 13D and the amendments thereto filed with the Commission and available to the investing public violate Sections 13 and 14 of the 1934 Act in failing to disclose the violations set forth in paragraph 37 and in failing to disclose other material facts set forth below.

FIRST COUNTERCLAIM

39. The Trustees repeat and reallege paragraphs 15 through 38, inclusive of this answer and counterclaim with the same force and effect as if fully set forth herein.

40. In furtherance of and pursuant to the aforesaid illegal plan, and commencing at a time unknown to NJB but believed to be no later than April 19, 1974, and continuing through the date of the filing of this answer and counterclaim, D-Z and the additional defendants have engaged in the solicitation of proxies, consents and authorizations from NJB shareholders in an effort to gain control of NJB. In an attempt to gain time for this effort, D-Z sought to enjoin the holding of NJB's annual meeting by filing the complaint herein. D-Z's motion for a preliminary injunction was denied by Judge Cannella of the Southern District of New York in an opinion dated June 11, 1974. D-Z's application for an expedited appeal was denied by the United States Court of Appeals for the Second Circuit on June 12, 1974. When D-Z's effort to enjoin the NJB annual meeting failed and the meeting was held as scheduled, D-Z and

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the additional defendants continued to solicit proxies, consents and authorizations in an attempt to call a special meeting of NJB's shareholders in order to oust the present trustees. The solicitations of NJB shareholders is continuing and is illegal in that, among other things:

(i) D-Z and the additional defendants solicited proxies, consents and authorizations from more than ten shareholders of NJB, although they have not filed Schedule 14B as required by Section 14(a) of the 1934 Act and Regulation 14(a) promulgated thereunder;

(ii) D-Z and the additional defendants solicited proxies from more than ten shareholders of NJB, although the persons solicited were not, and had not been, furnished with a proxy statement containing the information specified in Schedule 14A;

(iii) D-Z and the additional defendants solicited proxies from NJB shareholders by making use of false and misleading statements which fraudulently misstated or omitted material facts in violation of Rule 14a-9 promulgated under Section 14(a) of the 1934 Act.

41. By reason of the foregoing, NJB shareholders,

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whose proxies, consents and authorizations have been and are being solicited, are being deprived of the information they need to evaluate properly the plans, proposals and purposes of D-Z and the additional defendants and which is required to be disclosed to them by Section 14(a) of the 1934 Act and the rules and regulations promulgated thereunder. For example, D-Z and the additional defendants have failed to disclose to NJB shareholders even the identity of those persons proposed by D-Z and the additional defendants to serve as new or additional trustees and officers of NJB and at least in some instances D-Z, while directly or indirectly soliciting proxies or consents to call a meeting, has failed to disclose its own identity and purposes.

42. These violations of Section 14(a) are continuing and unless restrained will continue to cause NJB and its shareholders irreparable harm.

43. The Trustees have no adequate remedy at law.

SECOND COUNTERCLAIM

44. The Trustees repeat and reallege paragraphs 15 through 38 inclusive, of this answer and counterclaims with the same force and effect as if fully set forth herein.

45. The Schedule 13D and Amendments Nos. 1 through 3 thereto heretofore filed by D-Z state that D-Z has borrowed \$500,000 from Security, Zimmerman, Kroll, Sophier, Levow, Levin,

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Jacobson, Weinberg and Feinman (referred to herein collectively as the "Note Purchasers") in an allegedly "private placement" of its 6% promissory notes due March 31, 1975 and further state that additional funds were obtained by margin borrowings from Cantor Fitzgerald and from Ladenburg, Thalmann & Co., secured by pledges of all except 5,400 of the NJB shares purchased. Such borrowings are an integral part of D-Z's financing arrangements for the purchase of NJB shares and Cantor Fitzgerald has participated in the arrangement of such borrowings.

46. The NJB shares purchased by D-Z pursuant to its plan are listed on the Exchange, and any extension of credit by a broker-dealer made for the purpose of purchasing shares, or the arrangement of any such extension of credit by a broker-dealer, is subject to the margin requirements of Section 7 of the 1934 Act and the regulations of the Board of Governors of the Federal Reserve System (the "Board").

47. The aforesaid 6% promissory notes are an "extension of credit" within the meaning of Section 7 of the 1934 Act and Regulations G, T and X promulgated thereunder by the Board (12 CFR Section 207, 12 CFR Section 220, and 12 CFR Section 224).

48. Cantor Fitzgerald violated and continues to violate Regulation T. Section 7(a) of Regulation T (12 CFR Section 220.7 (a)) prohibits any broker-dealer from arranging for the extension or maintenance of credit to a customer of the broker-dealer except

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upon the same terms and conditions as those upon which the broker-dealer, under Regulation T, could extend or maintain credit to the customer. A broker-dealer cannot extend unsecured or undersecured loans for the purpose of purchasing securities. The aforesaid 68 promissory notes constitute an underscored extension of credit. In arranging for the aforesaid underscored extension of credit from Security, Zimmerman, Kroll, Sophier, Levow, Levin, Jacobson, Weinberg and Feinman on terms and conditions more favorable than those upon which Cantor Fitzgerald could extend credit to D-Z, Cantor Fitzgerald has violated Regulation T.

49. Furthermore, the extension of credit by Cantor Fitzgerald for the purpose of purchasing NJB shares with full knowledge of the arrangements made for financing the remaining portion of the purchase price for such shares from proceeds of the borrowings from the Note Purchasers and in conjunction with such borrowings constitutes an extension of credit and participation in an arrangement of extension of credit by a broker-dealer in violation of Regulation T.

50. Additional defendants, Security, Davis, Zimmerman, R. Becker and S. Becker as controlling persons of D-Z, by participating in a borrowing prohibited by Regulation T, have violated Regulation X.

51. Additional defendants Security, Zimmerman and the other Note Purchasers have violated and continue to violate

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Regulation G. Any extension of credit in an amount of \$50,000 or more for the purpose of purchasing listed shares which is secured by those shares is subject to the margin requirements. Regulation G prohibits persons other than a broker-dealer or a bank from extending such credit other than in compliance with said regulation. The extension of credit to D-Z by Security, Zimmerman, Kroll, Sophier, Levow, Levin, Jacobson, Weinberg and Feinman is and will be "indirectly secured" by the NJB shares purchased and intended to be purchased. Section 207.2(i) of Regulation G defines "indirectly secured" as

"any arrangement with the customer [D-Z] under which the customer's right or ability to sell, pledge, or otherwise dispose of margin securities owned by the customer is in any way restricted as long as the credit remains outstanding, or under which the exercise of such right, whether by written agreement or otherwise, is or may be cause for acceleration of the maturity of the credit. . . ."

An arrangement between Zimmerman, Security and the other Note Purchasers and D-Z exists which indirectly secures the extension of credit. Security and Zimmerman, as disclosed in the Schedule 13D filed by D-Z, and the other Note Purchasers, are controlling persons of D-Z and have the power to determine whether D-Z sells, pledges or otherwise disposes of the NJB shares and, therefore, Security, Zimmerman and the other Note Purchasers are in the position of lenders holding collateral. Any of the aforesaid arrangements render the extension of credit indirectly secured within the meaning of Section 207.2(i) of Regulation G. The

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extension of credit to D-Z by Security, Zimmerman and the other Note Purchasers and the failure to file the schedules required by Regulation G, and the borrowing of such credit by D-Z violate the requirements of Section 7 of the 1934 Act and Regulations G and X promulgated by the Board in that the extension of credit exceeds the maximum allowed by Regulation G and that the Note Purchasers are acting as unregistered lenders under Regulation G.

52. Additional defendants Security, Davis, Zimmerman, R. Becker and S. Becker, as controlling persons of D-Z, have violated Regulation X in participating in the aforesaid borrowing.

53. D Z and the additional defendants are violating and threatening future violations of the margin requirements as set forth above.

54. The Trustees have no adequate remedy at law.

THIRD COUNTERCLAIM

55. The Trustees repeat and reallege paragraphs 15 through 38, inclusive, of this answer and counterclaim with the same force and effect as if fully set forth herein.

56. D-Z is an investment company under Sections 3(a)(i) and 3(a)(iii) of the 1940 Act in that, among other things, it both holds itself out as being engaged primarily in the business of investing and proposes to engage primarily in the business of investing in securities and has acquired and holds investment

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securities (consisting of NJB shares) exceeding more than 40% of its assets.

57. D-Z is not exempt from the 1940 Act by reason of the number of its shareholders in that it is making and proposes to make a public offering of its securities, including specifically the 6% promissory notes referred to in paragraph 45 above, in violation of Section 5 of the 1933 Act.

58. D-Z has not registered as an investment company as required by the provisions of the 1940 Act or registered its 6% promissory notes pursuant to Section 5 of the 1933 Act.

59. The Schedule 13D filed by D-Z is false and misleading in that it fails to state that D-Z is an unregistered investment company, and that, accordingly, the purchasers of NJB shares are void by reason of Section 7 of the 1940 Act and in violation of Section 5 of the 1933 Act.

60. The Trustees have no adequate remedy at law.

FOURTH COUNTERCLAIM

61. The Trustees repeat and reallege paragraphs 15 through 38, inclusive, of this answer and counterclaim, with the same force and effect as if fully set forth herein.

62. By reason of their control of D-Z and the extension of credit granted to D-Z by the Note Purchasers and the partici-

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pation by Cantor Fitzgerald in the arrangement of the financing for D-2, D-2 and the additional defendants constitute a syndicate or group for the purpose of acquiring, holding, or disposing of NJB shares and pursuant to Section 13(d) are required to file but have not filed a Schedule 13D.

63. The Trustees have no adequate remedy at law.

FIFTH COUNTERCLAIM

64. The Trustees repeat and reallege paragraphs 15 through 38, inclusive of this answer and counterclaim with the same force and effect as if fully set forth herein.

65. During the period April 19, 1974 through July 8, 1974 D-2 has purchased a total of 158,500 shares of NJB stock as follows:

<u>Date of Purchase</u>	<u>Number of Shares</u>	<u>Source</u>
April 19, 1974	1,000	Exchange
April 22, 1974	4,600	Exchange
April 23, 1974	60,000	Over-The-Counter
April 26, 1974	5,400	Exchange
May 2, 1974	200	Exchange
May 6, 1974	3,200	Exchange
May 10, 1974	900	Exchange
May 14, 1974	2,000	Exchange
May 16, 1974	1,200	Exchange

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<u>Date of Purchase</u>	<u>Number of Shares</u>	<u>Source</u>
May 22, 1974	200	Exchange
May 24, 1974	19,000	Exchange
May 28, 1974	10,000	Exchange
June 5, 1974	500	Exchange
June 6, 1974	500	Exchange
June 14, 1974	6,900	Exchange
June 17, 1974	3,100	Exchange
June 18, 1974	3,000	Exchange
June 26, 1974	3,000	Exchange
June 27, 1974	8,700	Exchange
July 1, 1974	2,200	Exchange
July 2, 1974	10,000	Exchange
July 3, 1974	7,200	Over-The-Counter
July 3, 1974	5,700	Exchange

66. The aforesaid continuing large-scale purchases of NJB shares by D-Z and the additional defendants acting in concert with D-Z have been made with the announced purpose of taking over control of NJB and have been coupled with private solicitations and negotiations to purchase available additional shares for the same purpose. The aforesaid large-scale buying program of D-Z with the announced purpose of taking over control of NJB constitutes a tender offer or request or invitation for tenders as defined in Section 14(d)(1) of the 1934 Act and Rule 14d-1 promulgated thereunder. As a result of the aforesaid purchases made by

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or for D-Z prior to and on April 23, 1974, D-Z became the beneficial owner of in excess of 5% of the total number of outstanding shares of NJB not later than April 23, 1974.

67. By virtue of the aforesaid facts D-Z, before making the aforesaid purchases of NJB shares, and at the very least before or contemporaneous with the purchases as a result of which D-Z acquired 5% of NJB shares, was required to issue and file the statement required by Section 14(d)(1) of the 1934 Act and Rule 14d-1 promulgated thereunder, but failed to do so and thereby violated said Section and said Rule.

68. Although on or about May 3, 1974 D-Z did file with the Commission a Schedule 13D "pursuant to Section 13(d) of the Securities Exchange Act of 1934", and thereafter filed several Amendments to its Schedule 13D, said Schedule 13D and Amendments thereto do not comply with the requirements of Section 14(d)(1) of the 1934 Act and Rule 14d-1 promulgated thereunder, in that, among other things, said Schedule 13D and Amendments do not acknowledge and identify that the NJB share purchases by and for D-Z in fact constitute a tender offer as defined in Section 14(d)(1) of the 1934 Act and Rule 14d-1, nor do such Schedule and Amendments provide all the information required by Section 14(d) and Rule 14d-1 with respect to a tender offer.

69. The aforesaid failure by D-Z to file statements required by Section 14(d)(1) of the 1934 Act and Rule 14d-1 promulgated thereunder acknowledging that D-Z was in fact making

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a tender offer for NJB shares and making the other disclosures required by Section 14(d)(1) and Rule 14d-1 constitutes a violation of Section 14(e) of the 1934 Act.

70. Pursuant to Section 14(d)(7) of the 1934 Act and to Section 10b of the 1934 Act and Rule 10b-13 promulgated thereunder, D-Z is required during the course of its tender offer purchases to pay all sellers the same price for tendered shares. The aforesaid purchases by D-Z of NJB shares were however made at varying prices from different sellers in violation of Sections 14(d)(7) and 10(b) of the 1934 Act and Rule 10b-13 promulgated thereunder.

71. The aforesaid tender offer by D-Z for NJB shares violates Section 14(d)(5) of the 1934 Act in that such tender offer has not provided NJB shareholders with the requisite period of seven days after the details of the tender offer are made public to withdraw the shares which such shareholders are tendering.

72. The aforesaid violations of Sections 10(b), 14(d) and 14(e) of the 1934 Act and the aforesaid Rules promulgated thereunder have deprived tendering shareholders of the information concerning the tender offer and the tender offeror required to be disclosed by Section 14(d) as well as the parity of treatment required by Sections 10(b) and 14(d)(7). Such violations render all purchases and attempts to purchase NJB shares pursuant to such tender offer illegal and void.

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73. The Trustees have no adequate remedy at law.

SIXTH COUNTERCLAIM

74. The Trustees repeat and reallege paragraphs 15 through 38 inclusive of this answer and counterclaims with the same force and effect as if fully set forth herein.

75. On or about May 3, 1974, pursuant to and in furtherance of their unlawful plan, combination and conspiracy, D-Z filed with the Commission a Schedule 13D "pursuant to Section 13(d) of the Securities Exchange Act of 1934" with respect to the acquisition of shares of NJB by D-Z; Amendment No. 1 to Schedule 13D was filed by D-Z on or about May 21, 1974; Amendment No. 2 to Schedule 13D was filed by D-Z on or about June 3, 1974; and Amendment No. 3 to Schedule 13D was filed by D-Z on or about July 9, 1974. The Schedule 13D and Amendments Nos. 1, 2 and 3 were false and misleading, contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made under the circumstances in which they were made not misleading, in that, among other things, they:

(a) failed to disclose that D-Z and the additional defendants had engaged in unlawful solicitations of proxies, consents and authorizations in violation of Section 14(a) of the 1934 Act, as is more fully set forth in paragraphs 40 through 42 hereof;

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(b) failed to disclose extensions of credit in violation of Section 7 of the 1934 Act and the margin rules promulgated thereunder by the Board, including the failure to file appropriate Schedules and the making of appropriate disclosures under said Section and Rules, as is more fully set forth in paragraphs 45 through 53 hereof;

(c) failed to disclose that D-Z and the additional defendants have engaged in transactions in violation of Section 7 of the 1940 Act and Section 5 of the 1933 Act, as is more fully set forth in paragraphs 56 through 58 hereof;

(d) failed to reveal the existence of the aforesaid syndicate and group, as is more fully set forth in paragraph 62 hereof; and

(e) failed to reveal that D-Z and additional defendants were engaged in making an illegal tender offer with respect to NJB shares without complying with the provisions of Section 14(d) of the 1934 Act as is more fully set forth in paragraphs 65 through 72 hereof.

76. Additionally, D-Z's Schedule 13D and Amendments Nos. 1, 2 and 3 filed with the Commission were false and misleading, contained untrue statements of material facts and

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omitted to state material facts necessary in order to make the statements made under the circumstances in which they were made not misleading, in that, among other things, they:

(a) failed to disclose the intention of D-Z and the additional defendants to cause NJB to cease operations as a REIT and to liquidate the property of NJB and/or to merge NJB with Security, with irreparable and substantial adverse economic effects, including the imposition of additional taxes, on the shareholders of NJB;

(b) failed to disclose that D-Z was formed for the specific purpose of obtaining control of NJB and for the purpose of attempting to shield the true controlling parties in interest from having to make the required disclosures thereunder;

(c) failed to disclose material information concerning the terms of the 6% promissory notes and the rights of the Note Purchasers;

(d) failed to disclose that without the assets of NJB, D-Z would not have sufficient funds of its own to pay off the 6% promissory notes and that D-Z intends to pay off the promissory notes with the assets of NJB, all to the detriment of the other NJB shareholders;

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(e) failed to disclose any information whatsoever concerning Security, including information concerning Security's controlling shareholders;

(f) failed to disclose any financial information whatsoever concerning either D-Z or Security;

(g) sets forth D-Z's intention ultimately to control, through share purchases, the management and policies of NJB. However, the Schedule 13D failed to disclose that in order to control the management and policies of NJB through share purchases, D-Z would threaten the loss of NJB's REIT tax benefits in that if 50% of NJB's shares are owned by five or fewer individuals said tax benefits would be forfeited;

(h) sets forth D-Z's intention ultimately to control the management and policy of NJB, through share purchases. However, the Schedule 13D fails to disclose that there are insufficient funds presently existing to purchase sufficient additional shares to control the management and policy of NJB and that D-Z will be forced to make a further public offering of its securities in order to raise said funds, and in fact is continuing to attempt to sell its promissory notes to raise such funds, or the Schedule 13D is false in that it fails to set forth

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any arrangements or contracts to obtain additional funds for such share purchases;

(i) failed to disclose D-Z's plans and proposals with respect to NJB in any meaningful manner. The statement of D-Z's intentions in the Schedule 13D is so broad as to be meaningless and, in fact, is in itself false and misleading in that it improperly and unlawfully failed to disclose (a) D-Z's intention to liquidate the real estate holdings of NJB, (b) that any merger or similar action requires the affirmative vote of the holders of two-thirds of the outstanding shares, (c) that any merger of NJB with D-Z or Security would cause NJB to lose its REIT tax benefits, (d) D-Z's intention to modify or terminate the advisory agreement between NJB and NJB Prime Advisors (the "Advisor"), (e) that a modification or termination of the Advisory contract between NJB and the Advisor would cause NJB to lose its rights under the Advisory contract to (i) a 50% participation in the mortgage loans of the New Jersey Bank and (ii) a right of first refusal in any mortgage loan or real estate equity investment presented to Prime Motor Inns, Inc.;

(j) failed to disclose that purchases prior to April 22, 1974 were not made by D-Z but, were made by Security;

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(k) failed to disclose that NJB's trustees might be required, in order to maintain NJB's REIT tax benefits, to void and prevent sales of NJB shares to D-Z or to redeem shares already purchased by D-Z at a significant cash outlay, and that as such any transaction between D-Z and NJB shareholders may have to be voided to protect the REIT status of NJB.

77. Furthermore, during the period from June 3, 1974 through July 9, 1974 plaintiff D-Z and additional defendants acting in concert with plaintiff D-Z failed to comply with the requirements of Section 13(d)(2) of the 1934 Act and Rule 13d-2 promulgated thereunder in that D-Z failed promptly to file during said period amendments to its Schedule 13D setting forth material changes which had occurred in the facts as set forth in said Schedule 13D and Amendments 1 and 2 thereto, including the facts that throughout said period D-Z was making large-scale purchases both on the American Stock Exchange and Over-the-Counter as set forth in paragraph 65 hereof and that D-Z was continuing to offer and to sell its 6% promissory notes in order to obtain additional financing to purchase NJB shares.

78. By virtue of the failure of D-Z promptly to file amendments to its Schedule 13D during the period from June 3, 1974 to July 9, 1974, it was concealed from the Trustees, NJB and NJB's other shareholders that the unusually heavy trading

Answer and Counterclaims

activity in NJB shares and consequent market results throughout this period was due to D-Z's purchases pursuant to its aforesaid plan and tender offer program.

79. The aforesaid fraudulent actions, nondisclosures and misstatements in furtherance of the illegal plan, combination and conspiracy to seize control of NJB, threaten to impair the present ability of NJB to carry on its business. These threatened injuries result from the uncertainty regarding the future management of NJB, its future policy and conduct of its business. Moreover, the actions of D-Z and the additional defendants in furtherance of their illegal plan, combination and conspiracy, deprive NJB shareholders and the investing public, of material facts necessary to an enlightened decision relating to NJB and its securities.

80. The aforesaid violations of Sections 13(d) and 14(e) of the 1934 Act render all purchases and attempts to purchase NJB stock illegal and void under said Sections.

81. The Trustees have no adequate remedy at law.

WHEREFORE, the Trustees request judgment:

A. Dismissing the complaint together with costs and disbursements of this action, including reasonable attorneys' fees;

B. Directing that D-Z and the additional defendants be required to divest themselves of all shares of NJB acquired

Answer and Counterclaims

at the time when such purchases were made in violation of the 1934 Act and the 1940 Act;

C. Enjoining preliminarily and permanently D-Z and the additional defendants, their agents and all others acting in concert with them or on their behalf, directly or indirectly, from any of the following activities:

(1) Acquiring or attempting to acquire in any manner any shares or other securities of NJB;

(2) Making any tender offers for or requests or invitations for tenders for NJB shares;

(3) Borrowing or extending credit in violation of the margin requirements;

(4) Soliciting from any NJB shareholder any proxy, consent, or authorization to vote NJB shares;

(5) Voting in person or by proxy any shares of NJB held or acquired during the existence of the illegal scheme;

(6) Otherwise utilizing or attempting to utilize any such shares previously so acquired as a means of controlling or affecting the management of NJB;

(7) Exercising or attempting to exercise, directly or indirectly, any influence on the management of NJB; and/or

(8) Taking any other steps in furtherance of the fraudulent plan, scheme and conspiracy to gain control of NJB in violation of the 1934 Act and the 1940 Act and the rules and regulations promulgated thereunder;

D. Enjoining D-Z and the additional defendants and all others acting in concert with them or on their behalf from taking

Answer and Counterclaims

any of the actions set forth in paragraph C-1 through C-8 above until the effects of the conspiracy have been fully dissipated and the unlawful acts committed pursuant to the conspiracy have been fully corrected, including, but not limited to, the filing by D-Z and the additional defendants and others acting in concert with them or on their behalf of accurate and sufficient statements pursuant to the provisions of Sections 13(d), 14(a) and 14(d) of the 1934 Act and the rules and regulations promulgated thereunder;

E. Directing that NJB and the Trustees be reimbursed by D-Z and the additional defendants for the costs, expenses and damage caused to NJB and the Trustees by the unlawful acts of D-Z and the additional defendants, including reasonable attorneys' fees;

F. For such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
July 14, 1974

WACHTELL, LIPTON, ROSEN & KATZ

By *Robert E. Holloway*

A Member Of The Firm

Attorneys for Defendants
Robert E. Holloway, Melvin S. Taub,
Maurice J. Brick, Peter E. Simon,
Norman Brassler, Charles Giller,
Herbert E. Harper, Dr. Gordon McKinley,
James R. Moseley, III, Jack G. Taylor,
Dallas S. Townsend, Jr.
299 Park Avenue
New York, New York 10017
(212) 371-9200

REPLY TO COUNTERCLAIMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

D-Z INVESTMENT COMPANY, :

Plaintiff, :

-against- :

ROBERT E. HOLLOWAY, MELVIN S. TAUB, :
MAURICE J. BRICK, PETER E. SIMON, :
NORMAN BRASSLER, CHARLES GILLER, :
HERBERT E. HARPER, DR. GORDON MCKINLEY, :
JAMES R. MOSELEY, III, JACK G. TAYLOR, : 74 Civ. 2379 (I.B.W.)
DALLAS S. TOWNSEND, JR. and NJB PRIME :
INVESTORS, :

Defendants, :

-and- :

SECURITY MANAGEMENT CO., INC., CANTOR, :
FITZGERALD & CO., INC., BRUCE R. DAVIS, :
JEROME ZIMMERMAN, RALPH M. BECKER, :
SAUL BECKER, BERNARD KROLL, MAX SOPHIER, :
HAROLD LEVOW, HAROLD B. LEVIN, HARVEY :
JACOBSON, SEYMOUR WEINBERG and RONALD :
D. FEINMAN, :

Additional Defendants :
to Counterclaims.

----- X

REPLY TO
COUNTERCLAIMS

Plaintiff D-Z Investment Company ("D-Z") by its attorneys, Rubin Wachtel Baum & Levin, for its reply to the purported counterclaims (the "counterclaims") asserted against it by defendants Robert E. Holloway, Melvin S. Taub, Maurice J. Brick, Peter E. Simon, Norman Brassler, Charles Giller, Herbert E. Harper, Dr. Gordon McKinley, James R. Moseley, III, Jack G. Taylor and Dallas S. Townsend, Jr. ("the individual defendants"), alleges as follows:

FIRST DEFENSEAs to the Allegations Applicable to All Counterclaims

1. Denies each and every allegation contained in paragraph 15 of the counterclaims, except admits that the individual defendants purport to ground this Court's jurisdiction of the counterclaims upon 28 U.S.C. §§1331(a) and 1337 and Section 27 of the Securities Exchange Act of 1934 (the "1934 Act") [15 U.S.C. §78(aa)] and on the jurisdictional basis of D-Z's claims and that the individual defendants purport to assert claims allegedly arising under Sections 7, 10(b), 13(d), 14(a), 14(d), 14(e) of the 1934 Act [15 U.S.C. §§78g, 78j(b), 78m(d), 78n(a), 78n(d), and 78n(e)], Section 5 of the Securities Act of 1933 (the "1933 Act") 15 U.S.C. §77e, and Section 7 of the Investment Company Act of 1940 (the "1940 Act") 15 U.S.C. §80a-7.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the counterclaims, and refers to the public record and public filings and public statements made by or on behalf of defendant NJB Prime Investors ("NJB").

3. Denies each and every allegation contained in paragraph 17 of the counterclaims, except admits that each of the individual defendants presently purports to hold and does hold de facto the office of Trustee of NJB and that the counterclaims are purportedly asserted by the individual defendants on their own

behalf, on behalf of and in the right of NJB, and on behalf of all shareholders of NJB other than D-Z and those alleged to be acting in concert with D-Z.

4. Denies each and every allegation contained in paragraph 18 of the counterclaims, except admits that D-Z is a Delaware corporation which was formed on April 23, 1974 and which has its principal place of business at 420 14th Street, N.W., Atlanta, Georgia.

5. Denies each and every allegation contained in paragraph 19 of the counterclaims, except admits that Security Management Co., Inc. is a Georgia corporation which has its principal place of business at 420 14th Street, N.W., Atlanta, Georgia and which is engaged in real estate development and management, and apartment and condominium construction and the sale of land and is a shareholder of D-Z and a purchaser of certain notes issued by D-Z.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the counterclaims, except admits that Cantor, Fitzgerald & Co., Inc. is a dealer in securities with a place of business at 1345 Avenue of The Americas, New York, New York.

7. Admits the allegations contained in paragraph 21 of the counterclaims.

8. Denies each and every allegation contained in para-

graph 22 of the counterclaims, except admits that Jerome Zimmerman is a vice president, a shareholder, and a director of D-Z, resides at 3144 Wood Valley Road, N.W., Atlanta, Georgia, and is a purchaser of certain notes issued by D-Z.

9. Admits the allegations contained in paragraphs 23 and 24 of the counterclaims.

10. Denies each and every allegation contained in paragraphs 25, 26, 27, 28, 29, 30 and 31 of the counterclaims, except admits that Bernard Kroll ("Kroll") has an address at 100 Colony Square, Atlanta, Georgia; Max Sophier ("Sophier") has an address at 2575 Peachtree Street, N.E., Atlanta, Georgia; Harold Levow ("Levow") has an address at 1235 Mt. Paran Road, N.W., Atlanta, Georgia; Harold B. Levin ("Levin") has an address at 1293 Peachtree Street, N.E., Atlanta, Georgia; Harvey Jacobson ("Jacobson") has an address at 3236 East Wood Valley Road, N.W., Atlanta, Georgia; Seymour Weinberg ("Weinberg") has an address at Old Ivy Road, N.E., Atlanta, Georgia; and Ronald D. Feinman ("Feinman") has an address at 5310 London Drive, N.W., Atlanta, Georgia; and that each of Kroll, Sophier, Levow, Levin, Jacobson, Weinberg and Feinman is a purchaser of certain notes issued by D-Z.

11. Replying to the allegations contained in paragraph 32 of the counterclaims, avers that no response is necessary thereto.

Reply to Counterclaims

12. Denies each and every allegation contained in paragraphs 33, 34, 35, 36, 37 and 38 of the counterclaims.

As to the First Counterclaim

13. Replying to the allegations contained in paragraph 39 of the counterclaims, repeats the replies made herein to paragraphs 15 through 38 of the counterclaims.

14. Denies each and every allegation contained in paragraph 40 of the counterclaims, except admits that D-Z's application for a preliminary injunction was denied by Judge Cannella of this Court in an opinion dated June 11, 1974 and that the United States Court of Appeals for the Second Circuit denied D-Z's motion for an expedited appeal on June 12, 1974.

15. Denies each and every allegation contained in paragraphs 41, 42 and 43 of the counterclaims.

As to the Second Counterclaim

16. Replying to the allegations contained in paragraph 44 of the counterclaims, repeats the replies made herein to paragraphs 15 through 38 of the counterclaims.

17. Denies each and every allegation contained in paragraph 45 of the counterclaims, except admits the filing of a Schedule 13D Statement and certain amendments thereto and refers to that statement and those amendments for the information contained therein.

Reply to Counterclaims

18. Denies each and every allegation contained in paragraph 46 of the counterclaims, except avers that no response is necessary to the legal conclusions set forth in that paragraph and refers to the statutory provisions cited for the terms, tenor and legal effect thereof.

19. Denies each and every allegation contained in paragraphs 47, 48, 49, 50, 51, 52, 53 and 54 of the counterclaims.

As to the Third Counterclaim

20. Replying to the allegations contained in paragraph 55 of the counterclaims, repeats the replies made herein to paragraphs 15 through 38 of the counterclaims.

21. Denies each and every allegation contained in paragraphs 56 and 57 of the counterclaims.

22. Denies each and every allegation contained in paragraph 58 of the counterclaims, except avers that D-Z was not and is not required to register as an investment company under the provisions of the 1940 Act and was not and is not required to register certain notes issued by it under the provisions of the 1933 Act.

23. Denies each and every allegation contained in paragraphs 59 and 60 of the counterclaims.

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Reply to Counterclaims

As to the Fourth Counterclaim

24. Replying to the allegations contained in paragraph 61 of the counterclaims, repeats the replies made herein to paragraphs 15 through 38 of the counterclaims.

25. Denies each and every allegation contained in paragraphs 62 and 63 of the counterclaims.

As to the Fifth Counterclaim

26. Replying to the allegations contained in paragraph 64 of the counterclaims, repeats the replies made herein to paragraphs 15 through 38 of the counterclaims.

27. Admits the allegations contained in paragraph 65 of the counterclaims.

28. Denies each and every allegation contained in paragraphs 66, 67, 68, 69, 70, 71, 72 and 73 of the counterclaims.

As to the Sixth Counterclaim

29. Replying to paragraph 74 of the counterclaims, repeats the replies made herein to paragraphs 15 through 38 of the counterclaims.

30. Denies each and every allegation contained in paragraphs 75, 76, 77, 78, 79, 80 and 81 of the counterclaims.

Reply to Counterclaims

SECOND DEFENSE

31. Each of the counterclaims fails to state a claim upon which relief can be granted.

THIRD DEFENSE

32. Each of the counterclaims fails to state a claim upon which the equitable relief sought can be granted.

FOURTH DEFENSE

33. This Court lacks jurisdiction over the subject matter of the claims made in the counterclaims and each of them.

FIFTH DEFENSE

34. The individual defendants lack standing to maintain the counterclaims derivatively on behalf of NJB under Rule 23.1 of the Federal Rules of Civil Procedure.

SIXTH DEFENSE

35. The counterclaims fail to comply with the verification requirement applicable to derivative pleadings under Rule 23.1 of the Federal Rules of Civil Procedure.

SEVENTH DEFENSE

36. The counterclaims may not be maintained derivatively

on behalf of NJB because the individual defendants are not fairly and adequately representing the interests of the shareholders of NJB in enforcing the rights of NJB pursuant to the counterclaims.

EIGHTH DEFENSE

37. The individual defendants lack standing to maintain the counterclaims representatively on behalf of certain shareholders of NJB under Rule 23 of the Federal Rules of Civil Procedure.

NINTH DEFENSE

38. The counterclaims fail to comply with the requirements of local Civil Rule 11A of this Court applicable to class actions under Rule 23 of the Federal Rules of Civil Procedure.

TENTH DEFENSE

39. The individual defendants may not maintain this action as a representative action under Rule 23 of the Federal Rules of Civil Procedure because the individual defendants will not fairly and adequately protect the interests of shareholders of NJB since the claims of the individual defendants and the defenses applicable thereto are particular to the individual defendants.

ELEVENTH DEFENSE

40. The individual defendants lack standing to maintain the counterclaims individually and lack standing to maintain the counterclaims as Trustees of NJB.

TWELFTH DEFENSE

41. The individual defendants having procured their election as Trustees of NJB by false and misleading proxy materials and in violation of §14(a) of the 1934 Act, are not the duly elected Trustees of NJB and lack standing to assert the counterclaims on their own behalf, in their capacity as purported trustees or on behalf of NJB or its shareholders.

THIRTEENTH DEFENSE

42. Each of the individual defendants is estopped from maintaining any of the counterclaims by virtue of his unclean hands.

FOURTEENTH DEFENSE

43. This Court lacks jurisdiction over additional defendant Security Management Co., Inc. and over the persons of additional defendants Davis, Zimmerman, Ralph Becker, Saul Becker, Kroll, Sophier, Levow, Levin, Jacobson, Weinberg and Feinman.

*Reply to Counterclaims*FIFTEENTH DEFENSE

44. Venue as to additional defendants Security Management Co., Inc., Davis, Zimmerman, Ralph Becker, Saul Becker, Kroll, Sophier, Levow, Levin, Jacobson, Weinberg and Feinman is not properly laid in this judicial district.

WHEREFORE, plaintiff D-Z Investment Company demands judgment dismissing the counterclaims, and each of them, awarding it the costs and disbursements of this action (including reasonable attorneys' fees), and for such other and further relief as to this Court may seem just and proper.

Dated: New York, N.Y.
August 5, 1974

RUBIN WACHTEL BAUM & LEVIN

By 

A Member of the Firm
Attorneys for Plaintiff
D-Z Investment Company
598 Madison Avenue
New York, New York 10022
Tel. No. 759-2700

ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

D-Z INVESTMENT COMPANY, :

Plaintiff, :

-against- :

ROBERT E. HOLLOWAY, MELVIN S. TAUB, :

MAURICE J. BRICK, PETER E. SIMON, :

NORMAN BRASSLER, CHARLES GILLER, :

HERBERT E. HARPER, DR. GORDON MCKINLEY, :

JAMES R. MOSELEY, III, JACK G. TAYLOR, :

DALLAS S. TOWNSEND, JR. and NJB PRIME :

INVESTORS, :

Defendants, :

74 Civ. 2379
(I.B.W.)

ORDER TO SHOW
CAUSE

-and- :

SECURITY MANAGEMENT CO., INC., CANTOR, :

FITZGERALD & CO., INC., BRUCE R. DAVIS, :

JEROME ZIMMERMAN, RALPH M. BECKER, SAUL :

BECKER, BERNARD KROLL, MAX SOPHIER, :

HAROLD LEVOW, HAROLD B. LEVIN, HARVEY :

JACOBSON, SEYMOUR WEINBERG and RONALD :

D. FEINMAN, :

Additional Defendants :
to Counterclaims.

-----x

Upon the annexed affidavit of Bertram M. Kantor,
sworn to July 19, 1974, and the exhibits thereto, and upon
the annexed affidavits of Allen Maki and Herbert M. Wachtell,
respectively sworn to July 18, 1974 and July 19, 1974, and
good and sufficient cause appearing therefor; it is

ORDERED, that the plaintiff D-Z Investment Company
show cause before this Court, in Room 506, United States

Courthouse, Foley Square, New York, New York, on the ^{7th} ~~25th~~
^{August} ~~July~~ 1974, at ^{2:00} ~~10:00~~ o'clock in the ^{after} ~~forenoon~~ of that
day, or as soon thereafter as counsel can be heard, why an
order, pursuant to Rule 65(a) of the Federal Rules of
Civil Procedure, should not be made and entered herein,
preliminarily enjoining, during the pendency of this action,
plaintiff, its affiliates, officers, agents, servants, employees,
attorneys and those acting in concert or participation with them
who receive notice of such injunction, from:

(1) purchasing, offering to purchase,
ordering or otherwise arranging to purchase
shares of beneficial interest in NJB Prime
Investors, Inc.;

(2) soliciting, inviting, request-
ing or otherwise attempting to procure
proxies, authorizations or consents to the
call of a special shareholders' meeting
of NJB Prime Investors, Inc.; and

(3) voting or otherwise exercising
any rights incident to the ownership or
control of any shares of NJB Prime Investors,
Inc. owned or controlled by them,

and it is further

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Order to Show Cause

ORDERED, that service of a copy of this Order to Show Cause and the papers upon which it is based on the plaintiff herein or its attorneys shall be deemed good and sufficient if personally made on or before July 19, 1974 at 5:30 o'clock.

ISSUED: July 19, 1974
3:21 PM

/s/ Keith T. Dwyer

U.S.D.J.

AFFIDAVIT OF BERTRAM M. KANTOR IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

D-Z INVESTMENT COMPANY, :

Plaintiff, :

-against- :

ROBERT E. HOLLOWAY, MELVIN S. TAUB, :
MAURICE J. BRICK, PETER E. SIMON, :
NORMAN BRASSLER, CHARLES GILLER, :
HERBERT E. HARPER, DR. GORDON MCKINLEY, :
JAMES R. MOSELEY, III, JACK G. TAYLOR, :
DALLAS S. TOWNSEND, JR. and NJB PRIME :
INVESTORS, :

74 Civ. 2379
(I.B.W.)

Defendants, :

AFFIDAVIT

-and- :

SECURITY MANAGEMENT CO., INC., CANTOR, :
FITZGERALD & CO., INC., BRUCE R. DAVIS, :
JEROME ZIMMERMAN, RALPH M. BECKER, SAUL :
BECKER, BERNARD KROLL, MAX SOPHIER, :
HAROLD LEVOW, HAROLD B. LEVIN, HARVEY :
JACOBSON, SEYMOUR WEINBERG and RONALD :
D. FEINMAN, :

Additional Defendants :
to Counterclaims.

-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BERTRAM M. KANTOR, being duly sworn, deposes and says
that he is a member of the firm of Wachtell, Lipton, Rosen & Katz,
attorneys for the individual defendants in this action who are
the Trustees of NJB Prime Investors, Inc. ("NJB"), a real estate
investment trust whose shares are listed on the American Stock
Exchange and which is the target of a take-over attempt by the
plaintiff herein.

Affidavit of Bertram M. Kantor

1. This affidavit is submitted in support of the motion made herewith by the parties represented by your deponent's firm for a preliminary injunction against plaintiff, and those acting in concert with plaintiff, preliminarily enjoining them, during the pendency of this action, from:

(1) purchasing, offering to purchase, ordering or otherwise arranging to purchase shares of beneficial interest in NJB;

(2) soliciting, inviting, requesting and otherwise attempting to procure proxies, authorizations or consents to the call of a special shareholders' meeting of NJB; and

(3) voting or otherwise exercising any rights incident to the ownership or control of any shares of NJB owned or controlled by them.

2. This application is brought on by Order to Show Cause because of the extraordinary urgency of the moving defendants' need for protective relief. Thus, plaintiff and those firms and persons who are in concert with plaintiff are presently engaged in an admitted attempt to take-over control of NJB. This takeover attempt -- as is alleged in the moving defendants' counterclaims herein -- is marked by wholesale violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the rules and regulations

Affidavit of Bertram M. Kantor

promulgated thereunder. As is fully set forth herein and in the exhibits and other affidavits in support of this motion submitted herewith, the moving defendants' discovery obtained only during the past several days over the continued opposition of the plaintiff reveals that:

(a) plaintiff's Schedule 13D and amendments thereto in respect of its holdings of NJB, as filed with the Securities and Exchange Commission, are egregiously false and incomplete, and among other things, fail to set forth the fundamental facts relating to: (i) the sources of funds which plaintiff is using to finance its purchases of NJB shares; (ii) the true purposes for which plaintiff is purchasing the shares; and (iii) the identity of the members of the group which is engaged in acquiring shares of NJB;

(b) plaintiff has obtained a substantial portion of the funds with which it is financing its NJB purchases through an unregistered public offering in violation of the Securities Act, and has violated the Investment Company Act by failing to register as an investment company;

(c) plaintiff and additional defendant Cantor, Fitzgerald & Co., Inc. have violated the margin regulations in the financing of plaintiff's NJB purchases and in the arrangements therefor;

Affidavit of Bertram M. Kantor

(d) plaintiff is engaging in a de facto or "creeping" tender offer to existing shareholders of NJB, but has failed to comply with the disclosure provisions of the Williams Act intended to protect investors and issuers in a tender offer situation; and

(e) plaintiff and its agents have been engaging in the solicitation of proxies to convene an NJB shareholders meeting without complying with section 14 of the Exchange Act and the proxy rules promulgated thereunder.

Plaintiff's continued purchases of NJB shares since July 12, 1974, which purchases have included substantial transactions this week, confirm plaintiff's avowed intent to continue with its plan to acquire a large quantity of NJB shares and ultimately to control NJB. Thus, unless and until it is restrained by this Court, plaintiff will persist in its violations of the federal securities laws to the irreparable injury of NJB, the NJB shareholders and the moving defendants as Trustees of NJB.

NATURE OF ACTION
AND PRIOR PROCEEDINGS

3. This action was originally instituted, purportedly on behalf of the shareholders of NJB and also derivatively in the right of NJB, as part of plaintiff's take-over at-

Affidavit of Bertram M. Kantor

tempt. The action was filed on June 3, 1974, some ten days prior to the regularly scheduled annual shareholders' meeting of NJB, and on June 7, 1974, plaintiff brought on a motion to enjoin the shareholders' meeting, or to enjoin the voting of proxies obtained by the incumbent Trustees at such meeting, on the grounds of alleged violations of section 14(c) of the Exchange Act and the proxy rules thereunder. That motion was denied in all respects by Judge John M. Cannella of this Court, and a further application for injunctive relief to the Court of Appeals for this Circuit was likewise denied. Judge Cannella expressly determined that plaintiff's allegations of wrongdoing by the Trustees were not supported by the record on the motion; that the probability of plaintiff's ultimate success in the action was, on the basis of that record, "quite remote"; and indeed, that at least some of plaintiff's allegations were "totally without basis in fact." The annual meeting of NJB thus duly went forward on June 13, 1974, and the Trustees nominated in the proxy materials challenged by plaintiff were elected.

4. On July 1, 1974, our firm was retained to represent the individual Trustees of NJB. Since that time we have attempted to initiate the necessary discovery to unearth the facts surrounding plaintiff's attempt to gain control of NJB. Plaintiff and the persons and firms who have been named as additional defendants to counterclaims in the answer of the

Affidavit of Bertram M. Kantor

moving defendants have, however, made repeated efforts to prevent discovery by filing motions to stay discovery or to quash subpoenas in both this Court and in the District Court for the Northern District of Georgia. On July 9, before Judge Ward of this Court, plaintiff initially obtained an interim stay of discovery but only upon condition that all purchases of NJB shares and solicitation of NJB proxies by or on behalf of plaintiff would cease. Three days later, on July 12, plaintiff sought to have the interim stay lifted -- apparently having decided that because of its desire to continue purchasing NJB shares and/or soliciting proxies, it could not accept the condition Judge Ward had insisted upon. Judge Ward did vacate the stay but directed that discovery herein go forward on an expedited basis. Thereafter, both before this Court and before the District Court in Georgia, discovery was again sought to be blocked or delayed. These applications, however, were denied on July 16 by both Courts and discovery was ordered to proceed as scheduled.

5. The discovery which the Trustees have won the right to commence has included the taking of three depositions in which the bulk of the facts set forth in the succeeding sections of this affidavit were developed.* This affidavit is being prepared on

* These depositions include one day's examination each of Jerome Zimmerman, a principal of plaintiff, Cantor, Fitzgerald & Co., Inc.
[footnote continued]

Affidavit of Bertram M. Kantor

Thursday, July 18, and it has been a physical impossibility to incorporate herein all facts which may have become available after this afternoon. Notably, it has not been possible to incorporate the information contained in documents produced by plaintiff in the course of this Thursday evening. However, a quick scan of these documents reveals additional major, glaring and hitherto unknown and unsuspected violations of the securities laws by plaintiff.* It is contemplated that all matters revealed in this document production and the results of further discovery will be put before the Court in supplementary affidavits as appropriate. However, the following picture of the activities of plaintiff and those acting in concert with plaintiff emerges from the discovery had to date.

[footnote continued]

by one of its officers, Lawrence F. Orbe, and Harold B. Levin, an investor in plaintiff. For the Court's convenience copies of the Zimmerman and Orbe transcripts are being submitted herewith. (The Levin transcript is not yet available since the deposition was held only yesterday in Atlanta, Georgia.) References to the deposition of Mr. Zimmerman are designated herein by a "Z", and references to the deposition of Mr. Orbe are designated herein by an "O".

* For example, these documents include a letter agreement dated June 27, 1974, providing for a \$2,700,000 loan commitment "in connection with the proposed tender offer by [D-Z] for 350,000 shares of beneficial interest of NJB Prime Investors" A \$5,000 payment was made that day for such commitment. No such agreement or payment has ever been disclosed by plaintiff, nor has there ever been the remotest indication of such "proposed tender offer." The almost incredible effrontery of the violations of sections 13(d) and 14(e) of the 1934 Act is self-evident.

SUMMARY OF FACTS

6. The attempt to gain control of NJB by plaintiff which has given rise to this action represents the culmination of the joint efforts of Bruce R. Davis (the "D" of plaintiff D-Z), the brokerage firm of Cantor, Fitzgerald Co., Inc. ("Cantor, Fitzgerald") and Jerome Zimmerman (the "Z" of D-Z). From the outset, in early January 1974, Davis and Zimmerman formulated a plan to take over control of a real estate investment trust ("REIT") (Z24-25), although it was not until April 1974 that Davis and Zimmerman ultimately joined forces by the formation of D-Z. (Z18, Z20).

7. The vehicle for the takeover is plaintiff D-Z Investment Company ("D-Z"), a shell corporation formed in April 1974 (Z18) as a self-styled and unregistered investment company created for the express purpose of acquiring shares of NJB (Z20, Z23-24) and otherwise waging this takeover attempt. (Z49.) Half of the stock of D-Z is owned by Security Management Co., Inc. ("Security") (Z115), a real estate development and management company headed by Davis; the other half of the D-Z stock is owned by Zimmerman. Security and Zimmerman paid \$100 a share for the 50 shares which they each purchased. (Z115.)

8. The creation of D-Z followed other attempts by Davis and Cantor, Fitzgerald to gain control of a REIT for Davis and/or Security. (O45.) In January 1974 Davis had approached

Affidavit of Bertram M. Kantor

Cantor, Fitzgerald to ascertain whether that firm would act as an investment banker for Security (017) and assist Davis in obtaining an acquisition or merger candidate for Security. (014.)

Cantor, Fitzgerald then proposed two Florida based companies as potential candidates for acquisition by Security. (031.) However, both prospects were abandoned in late February 1974 (for reasons not important here). (041-42.)

9. Cantor, Fitzgerald continued to look for an acquisition candidate for Security, as did Davis. (042.) In late February or early March 1974 Davis came to New York and proposed to Cantor, Fitzgerald the idea of attempting to obtain control of a REIT. (042.) Davis brought with him extensive information concerning the finances and operations of some 25 REITs, including NJB. (042-43.) Davis and Cantor, Fitzgerald obtained additional financial information (048-50), and ultimately Cantor, Fitzgerald narrowed the potential candidates to four REITs, including NJB. (053-54.) Finally, NJB was selected as the target for takeover. Davis and Cantor, Fitzgerald had discussions in which Davis formulated and expressed specific views as to how he would change NJB's operations and how he would dispose of its properties should he acquire control. (057-59.) The Cantor, Fitzgerald officer with whom Davis dealt has testified that Davis has never expressed a contrary view on these matters. (059.)

10. Attention then turned to the question of how the takeover of NJB would be effected. Cantor, Fitzgerald proposed

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an approach to CNA Financial Corporation ("CNA") which was known to Cantor, Fitzgerald to then be the holder of approximately 100,000 shares of NJB. (0144, 150.) Through the efforts of Cantor, Fitzgerald a joint venture was formulated between Davis and Barry Silverstein, a representative and business partner of CNA, to conduct a tender offer for up to two-thirds of the shares of NJB. (0144-151.) The concept of the joint venture was that the CNA interests would provide the necessary financial aid, while Davis and Security would supply the real estate know-how and management. (0152.) The joint venture was reduced to a letter of intent between Davis and Silverstein, a copy of which is annexed hereto as Exhibit "A". (0157.) The letter of intent sets forth, among other things, the possibility of a merger of Security into NJB and then of "a transfer [from Security to NJB] of the initial debt used in the tender offer to NJB". (Exhibit "A", p. 2.)

11. Cantor, Fitzgerald on behalf of Davis contacted the NJB management to enlist their cooperation in a "friendly" takeover. (0154.) This approach, which was rebuffed by the NJB management (0155-156), was followed up by a letter by Orbe, a copy of which is annexed hereto as Exhibit "B". It is noteworthy that the Orbe letter which is dated March 19, 1974 recites at that early date the intent of Cantor, Fitzgerald's undisclosed client -- Davis -- to obtain 51% control of NJB.

12. In mid-April CNA terminated the letter of intent

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and the proposed joint venture was abandoned. (0183A, 184.) At this point Zimmerman re-entered the picture. A plan was formulated between Davis and Zimmerman to obtain the financing necessary for a takeover of NJB. (Z48-49.) The plan called for the formation of D-Z as a vehicle for the NJB takeover (Z18, 20, 23); the sale of \$1,250,000 in promissory notes of D-Z (Z48-50, 138-9) by Zimmerman to members of the Atlanta community in units of at least \$50,000 (Z219, 222, 143, 187); and the use of 50 percent margin financing to be obtained through Cantor, Fitzgerald. (Z51, 54.) It was agreed that Zimmerman's role would be to raise the necessary funds by soliciting as many persons of his acquaintance as might be necessary to raise the \$1,250,000. (Z216-219, 222, 182.) It was contemplated that by the use of 50 percent margin financing, D-Z would be able to purchase approximately \$2,200,000 worth or about 300,000 NJB shares. (Z50a, 51.) In addition to supplying the necessary margin financing, Cantor, Fitzgerald was to broker the purchases of NJB shares for D-Z, and to advise D-Z concerning the operations of NJB. (Z53-4), (0231).

13. Implementation of the D-Z plan unrolled smoothly at the beginning. Even before D-Z was incorporated, a brokerage account was opened at Cantor, Fitzgerald in the name of Security (019, 0217, 0223), and on April 19 purchases of NJB shares by Cantor, Fitzgerald for the group commenced. (0217, 0222.) Cantor, Fitzgerald did in fact supply margin financing to D-Z as contemplated. (0174-5.) Subsequent to the formation of D-Z on April 23,

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the name of the account was changed from Security to D-Z. (0223.) Zimmerman likewise carried out his part of the plan. He offered the 6 percent promissory notes of D-Z to various acquaintances in and around Atlanta, and distributed a self-styled "Private Offering Memorandum" to some or all of the offerees. The Memorandum disclosed that D-Z's business would be the acquisition of the shares of a REIT, but explicitly refrained from identifying NJB as the REIT in question. The Memorandum further stated that D-Z's ability to repay the 6 percent notes depended upon the receipt of dividends from the REIT, or the proceeds which might be realized upon the sale of D-Z's NJB shares, or the issuance of a further series of securities consisting in part of D-Z's common stock which would be issued at \$1250 per share.

14. As a result of purchases made prior to and on April 23, D-Z became the owner of 65,000 NJB shares, representing in excess of 5 per cent of the number of shares outstanding. On May 3 it filed a Schedule 13D with the Securities and Exchange Commission. On May 21 and June 3 it filed Amendment Nos. 1 and 2 thereto, which showed further purchases of 36,300 shares of NJB.

15. Shortly thereafter D-Z's plan began to founder. Thus, as noted previously, D-Z failed in its attempt to enjoin the annual shareholders' meeting of NJB. (See ¶ 3, supra). At the meeting, Davis' challenges to the Trustees gained no support. At about the same time Zimmerman found it increasingly difficult

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to sell any more of D-Z's notes. (2223.) And Cantor, Fitzgerald declined to make further margin financing available. (0175.)

16. Notwithstanding these set-backs, plaintiff and those acting in concert with it continued to press their attempt to take over NJB. Cantor, Fitzgerald introduced Davis to the brokerage firm of Ladenburg, Thalmann & Co. which agreed to make further purchases of NJB shares for plaintiff on margin. (0275.) Cantor, Fitzgerald also attempted to obtain additional financing for plaintiff through several banks, including the Sterling National Bank. (0275.) Davis stated that he intended to acquire 20 per cent of NJB's shares, the number necessary under NJB's Declaration of Trust to convene a special shareholders' meeting (0248-249), and directed that all shares that became available should be bought. (0260, 94.) Additionally, the services of Georgeson & Co., a proxy solicitation firm, were retained. (0241-242.) And as set forth in detail in ¶¶42-43, infra, there is substantial evidence indicating that Cantor, Fitzgerald itself has solicited NJB shareholders for their proxies or consents to the call of a special meeting.

17. On July 9, plaintiff filed Amendment No. 3 to its Schedule 13D which showed additional purchases of 51,000 NJB shares between May 22 and July 3, giving plaintiff as of that date a total of 158,500 shares. While all purchases were stayed between July 10 and mid-day of July 12 by order of Judge Ward of this Court, plaintiff resumed its purchases on

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the afternoon of July 12 (purchasing 1,100 shares that very day), and between that day and July 16, plaintiff purchased an approximate total of 5,500 additional shares. (090, 135.)

18. Cantor, Fitzgerald is currently operating under instructions received from Davis on July 12 to purchase in the open market as many shares of NJB stock as are offered for sale subject to certain price parameters. (098.) No limitation exists as to the total amount of shares to be purchased by Cantor, Fitzgerald nor was any ceiling specified as to the total number of shares to be acquired by plaintiff. (094-95.) These shares are being purchased for cash and not on margin. (098.)

A. Plaintiff D-Z's Schedule 13D Filings with Respect to its Purchases of NJB Shares are False, Misleading and Incomplete.

19. Evidence obtained in the discovery had in this action to date reveals that the Schedule 13D filing of D-Z with respect to its holdings in NJB and the three amendments thereto (copies of which are annexed hereto as Exhibits "C" through "F") are a tissue of inaccuracies, misstatements and omissions. Thus, the D-Z 13D filings fail to reveal the following material facts, among others:

(1) that in April 1974 Davis and Zimmerman through D-Z and with the active assistance of Cantor, Fitzgerald had formulated a specific, carefully worked-out program by which they intended to obtain control of NJB;

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(2) that in April 1974 D-Z determined to achieve this purpose by purchasing approximately 300,000 shares of NJB;

(3) that D-Z determined no later than April 1974 to finance the necessary transactions entirely by borrowings and specifically by offering and selling \$1,250,000 of 6 percent promissory notes of plaintiff in a purported private placement, and by 50 percent margin loans;

(4) that in order to make the 6 percent notes of D-Z to be sold in the private placement saleable, (a) it was represented in the "Private Placement Memorandum" (which was not annexed to the 13D as an exhibit) that a further offering of securities of D-Z would be made, specifically an offering of "units" consisting of 5 shares of D-Z's common stock (valued at \$1,250 per share) and \$45,000 of additional notes of D-Z, and (b) it was contemplated that the purchasers of the 6 percent notes would have the right to convert these securities into the aforesaid "units";

(5) that all of the issued and outstanding stock of D-Z had been pledged

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by Security and Zimmerman to secure the repayment of the 6 per-cent notes issued in D-Z's purported private placement;

(6) that the purported private placement was in fact not exempt from registration under the Securities Act;

(7) that D-Z intended and intends to effectuate a merger of NJB if it obtains control;

(8) that D-Z intends to repay its investors with the assets of NJB;

(9) that D-Z has issued standing instructions to its broker to purchase every share of NJB it can get;

(10) that D-Z has authorized the solicitation of proxies for the call of a special shareholders' meeting; and

(11) that D-Z is not exempt from registration under the Investment Company Act.

20. In lieu of candidly setting forth D-Z's intention to obtain control of NJB, and the existence of specific, carefully worked-out plans to that end, D-Z's 13D filings completely

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misrepresent its intentions by blandly stating instead that D-Z "may take such action from time to time as it may deem proper in light of future developments in order to obtain control of NJB and for the best interests of NJB".

21. Thus, none of the basic facts set forth above concerning plaintiff's purchases of NJB shares are disclosed in plaintiff's 13D filings, but on the contrary the 13D affirmatively misrepresents these facts. For example, the 13D completely misrepresents plaintiff's intentions with respect to its purchases of NJB shares. While the 13D states only that plaintiff's "future actions may include: (i) Acquisition of additional NJB Shares . . ." (Exhibit "C", p. 3) (emphasis added), the actual facts are that since no later than April 1974 -- before the 13D was filed -- plaintiff's principals and their confederates had determined to acquire a carefully calculated number of NJB shares (Z250-50a), had made elaborate financing arrangements based on these calculations (Z187) and have since the note sales ceased determined to effect unlimited purchases of NJB shares for cash (O97-98).

22. Plaintiff's 13D misrepresents the purported private placement of notes by which plaintiff initially raised its financial stake. While the 13D states that its "funds were obtained by D-Z in a private placement of its 6% promissory notes" (Exhibit "C", p. 2), it completely omits any reference to the terms and conditions of this offering as

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they are revealed in the Private Placement Memorandum (a copy of which is annexed hereto as Exhibit "G") and the deposition testimony of Zimmerman, nor is the Memorandum annexed as an exhibit. Thus, the 13D conceals the facts that the noteholders have in substance a conversion right into equity securities of plaintiff (Z-134-35; Exhibit "G", pp. 7-8), that all of the stock of plaintiff is pledged to secure the notes (although the only asset of plaintiff -- its NJB shares -- secures massive margin loans to plaintiff from Cantor, Fitzgerald) (Exhibit "G", pp. 6, 87), that the noteholders were not apprised of the name of the entity whose shares plaintiff was formed to buy (Exhibit "G", p. 4), and thus that they were being sold a "pig in a poke."

23. The D-Z 13D misrepresents Cantor, Fitzgerald's role in plaintiff's activities. Thus, the 13D states only that "the balance of the purchase cost was obtained by margin borrowings of \$3 per share from Cantor, Fitzgerald, . . . secured by pledge of the NJB shares purchased," and that Cantor, Fitzgerald "has been retained to render certain services in connection with D-Z's purchases of NJB Shares" (Exhibit "C", pp. 2, 5.) But the 13D is grossly misleading in failing to state that Cantor, Fitzgerald had rendered investment counseling services in connection with Davis' desire to expand Security's business by merger or acquisition, and specifically that Cantor, Fitzgerald had approached NJB on behalf of Security with an acquisition proposal.

24. Finally, the D-Z 13D is fatally vague and misleading with respect to the most crucial aspect of a 13D filing -- the "purpose" of plaintiff's transactions in NJB shares. Thus, if one reads Item 4 of the 13D (Exhibit "C", pp. 2-4), one is left with the impression that plaintiff has only the most general, non-specific intentions with respect to the NJB shares. Yet it is obvious from the discovery to date that plaintiff must be intending to merge NJB either into itself or into Security in light of the facts: (a) that Davis' involvement in the D-Z deal stemmed from his desire to expand the business of Security through merger and acquisitions (014); (b) that his involvement with Cantor, Fitzgerald stemmed from the same purpose (017); (c) that Cantor, Fitzgerald approached the management of NJB on behalf of Security to inquire if it wished to be acquired by Security (0154-155; Exhibit "B"), and finally (d) that D-Z has no assets except the NJB shares and cannot repay its notes unless it acquires control of the assets of NJB.

25. In sum, it is clear that both the letter of Section 13(d) and its underlying purposes have been and are being flagrantly violated and disregarded by plaintiff. ~~As~~ one views plaintiff's takeover effort as the discovery in this action has revealed it, and contrasts that picture of plaintiff's activities with its perfunctory 13D filings, it is readily seen that plaintiff has only gone through the motions of apparently complying with the statute and regulations, has failed to file timely and

candid amendments as its specific plans have evolved, and indeed has either wilfully or recklessly excluded from its filings precisely the kind of information which the federal securities laws intend should be candidly disclosed.

B. Plaintiff Has Violated the Registration Requirements of the Securities Act and of the Investment Company Act.

26. A substantial portion of the funds with which plaintiff has purchased its NJB shares was raised by the offer and sale of plaintiff's 6 per cent notes to a group of people in and around Atlanta, Georgia (Z119, Z16-19). These notes of plaintiff are admittedly not registered pursuant to section 5 of the Securities Act because of a claimed exemption as a "nonpublic" offering within the meaning of section 4(2) of the Act. (Exhibit "G", p. 3.) The disclosures in discovery had to date plainly establish that plaintiff has not brought its note transaction within the narrow limits which the Courts and the Securities and Exchange Commission have placed on the section 4(2) exemption, or within the terms of the recently adopted Rule 146. On the contrary, the deposition testimony of Mr. Zimmerman -- who has stated that he was solely responsible for identifying and selling potential note purchasers on the deal (Z219) -- establishes that he was acting pursuant to a plan which necessitated and in fact involved extensive solicitations and the making of numerous offers to individuals of limited investment acumen in which crucial facts about the issuer and the issue were either not disclosed or seriously misrepresented.

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27. Thus, discovery has revealed that plaintiff and its control persons determined to sell plaintiff's notes to as many as 25 purchasers in order to raise the \$1,250,000 they sought. (Z48-49, 50-50a, 183.) To Zimmerman's knowledge, there was no limit set as to the number of people who might be offered the notes, the only intention being that enough purchasers be found to produce a total of \$1,250,000, in minimum subscriptions of \$50,000. (Z182e, Z222.) Zimmerman kept no records of the number of people he contacted in his efforts to sell the notes (Z218), but he does recollect that a number of people he approached and solicited turned him down. (Z216-17, Z223.) The obvious conclusion to be drawn from this uncontrolled, unlimited pattern of solicitation is that plaintiff intended to solicit as many people as necessary to obtain the \$1,250,000 it had been determined was needed. Indeed, it must have been contemplated that a significant number of people would have to be solicited in order to come up with 25 purchasers in light of the facts that: (a) the security being sold was the promissory note of a corporation with virtually no assets; (b) the note bore interest at a rate of 6 per cent per annum, while the prime rate was more than 10 per cent; (c) the Private Placement Memorandum which was the only concrete information furnished to the offerees was vague and misleading, as is further set forth hereinafter; and (d) what was apparently the essence of the deal -- i.e., the opportunity to convert the notes into an equity interest -- was not embodied in a written commitment. (Z134-135.)

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28. Not only was there no limit placed on the number of offerees, but discovery has made it abundantly clear that no boundaries were placed on the kinds of people who might be contacted so as to assure that they were knowledgeable and sophisticated investors not in need of the ~~protection~~ of the registration provisions of the Securities Act. Thus the offerees were not a group of executives or key employees of an issuer, nor a group of individuals with extensive common business or investment experience, but a disparate group of people who essentially had and have nothing in common except the fact that their names resided in Zimmerman's personal telephone directory. (2216-218.) Thus, according to Zimmerman's deposition testimony, the offerees included a gynecologist (2164), a retired exterminator,* one gentleman in the scrap iron business and another in the secondary lead recovery business. (2220.) In short, plaintiff totally failed to confine its offering in the careful, scrupulous way which the Courts have required to make the private offering exemption available. Nor, it might be noted, did plaintiff make any attempt to satisfy itself that the offerees were being advised by "offeree representatives," as that term is used in the

* The retired exterminator did not accept D-Z's offer, no doubt because he smelled a rat.

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SEC's recently adopted Rule 146* -- i.e., some other person with the requisite sophistication and knowledge to advise the offeree on the offer -- or that they met the standards of Rule 146 relating to an investor's financial ability to assume the risks of an investment. (Z221.) Indeed, the very terms of the investment strongly suggest that the note purchasers could not be very sophisticated, in that they were purchasing 6 percent notes of a shell corporation at a time of record high interest rates, the notes were callable without penalty or premium, the identity of NJB was not disclosed to them, and their apparent equity "kicker" -- the conversion right into stock of plaintiff -- was never committed to them in writing. (Z134-35; Exhibit "G" [¶ 3 of attached promissory note; p. 4 of offering memo].).

29. But in the last analysis, the sine qua non of the private offering exemption -- whether under judge-made rules or the standards of Rule 146 -- is that the offerees have access to or are supplied with substantially the kind of information which a registration statement would disclose. Here, that full disclosure has been totally lacking. Thus, discovery has revealed that, notwithstanding that plaintiff is a shell company, whose sole asset is its shares of NJB, plaintiff did not furnish the offerees with any financial information concerning NJB, no

* While Rule 146 has an effective date of June 10, 1974, many of its provisions -- including the concept of an "offeree representative" -- embody sound practices of issuers in assuring that the spirit of the registration provisions is not disregarded in a purported "private placement."

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annual reports, quarterly reports, 10-K's, 8-K's, proxy statements or registration statements. (2209.) Indeed, the scanty information which was furnished to the offerees concerning their purchases -- i.e., the "Private Placement Memorandum" -- did not even name NJB as the entity whose shares plaintiff would buy with the note proceeds. On the contrary, the sole statements in the "Private Placement Memorandum" relating to the assets of the issuer were these:

Initially the Company intends to acquire an interest in a real estate investment trust ("REIT"). In order to retain the confidentiality of the acquisition so that purchases may be at the most favorable prices, the Company does not intend to disclose the name of the REIT whose stock is and will be accumulated until such time as the Company is required to disclose such information in accordance with Section 13 of the Securities Exchange Act.

-- Exhibit "G", p. 4.

Yet, it is the essence of a lawful "private placement" that the issuer "is required to disclose such information in accordance with" section 4(2) of the Securities Act. By reason of plaintiff's total failure to identify NJB as its target, the note offerees manifestly had no opportunity to review not only whatever plaintiff may have had in the way of financial statements of NJB or projections or analyses with respect to NJB, but even information about NJB which might have been available from brokerage houses, newspapers and NJB itself.* It is noteworthy in this

* Moreover, in tacit recognition of the fact that plaintiff is nothing but a shell corporation, plaintiff did not furnish the noteholders with any financial information about plaintiff itself, although it is the issuer of the notes -- no financial statements, and no pro forma financial statements (as if its program of acquisition had been effected). (2212-13.)

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connection that before Cantor, Fitzgerald joined forces with plaintiff and its principals in the attempt to take over NJB, its officers with responsibilities on the D-Z deal all concurred -- with Davis -- that it was desirable to review the 10-K's, annual reports and quarterly reports of NJB to make an informed investment decision. (049-50, 145-6.) Thus, those in control of the deal recognized the importance of reviewing information which was not made available to the investors at the bottom, and which was in fact concealed from them by plaintiff's failure to identify NJB in the Private Placement Memorandum.*

30. It is all too apparent that the offerees were being shown a pig in a poke. Far from placing them in a position to make an informed investment decision -- so that the private placement exemption from registration might become available -- plaintiff's conduct is a text-book example of why it was and is necessary to have a detailed statutory scheme -- the registration provisions of the Securities Act -- to assure that investors are not gulled by careless or unscrupulous promoters. For not only were the offerees not given and in effect denied access to the crucial information about NJB, but the route by which they were personally to actually acquire an interest in NJB, i.e., the exchange or conversion of the notes for or into "units" partly com-

* Your deponent is advised by one of his partners, who conducted the deposition of Dr. Levin -- one of the notepurchasers -- that his examination fully confirms that Levin was given virtually no investment information prior to his purchase on April 29.

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prised of stock of D-Z, was misrepresented to them. Thus, there can be no doubt that the clear purport of the Private Placement Memorandum taken as a whole is that the note-holders are to have at least a right of first refusal of the "units." Yet, the Memorandum refrains from actually making a commitment to that effect, and Zimmerman's deposition testimony suggests that plaintiff drew a clear line between "contemplating" that the note-holders would get first crack at the "units," and actually making a commitment to give them a right to do so. (Z134-37.) Moreover, the Memorandum does not disclose that whereas the D-Z shares in the "units" would be priced at \$1,250, Davis and Zimmerman had paid only \$100 a share for their D-Z stock (Z115). In Securities Act terms, the dilution impact of the promoters' stock was kept completely hidden.*

31. In sum, the funds with which plaintiff has been financing its purchases were raised in a transaction which is in flagrant violation of the Securities Act, and plaintiff thereby stands exposed to rescission suits under section 12 of the Act which may substantially strip it of its assets. The grave consequences to NJB if plaintiff is permitted to continue its take-over program are manifest.

* Your deponent is advised that Dr. Levin testified in substance that he had had no idea that Davis and Zimmerman had paid only \$100 a share for their stock.

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32. By reason of the aforesaid violations of the Securities Act plaintiff is also in violation of the registration requirements of the Investment Company Act of 1940. As an illegally unregistered investment company, not only its sales of securities are voidable, but its purchases of securities -- i.e., NJB shares -- are voidable as well.

C. Plaintiff and Cantor, Fitzgerald Have Violated the Margin Regulations in Financing Plaintiff's Take-Over Attempt

33. Plaintiff's failure to disclose in its 13D the central role that Cantor, Fitzgerald has played in its take-over attempt has had the specific effect of concealing the facts -- now revealed by discovery herein -- which indicate that Cantor, Fitzgerald has contravened the margin regulations and specifically Regulation T thereof, by its conduct herein. Regulation T, in pertinent part, permits a broker to "arrange for the extension of credit to or for any customer" only upon "the same terms and conditions" as the broker may himself extend credit -- i.e., subject to the conditions that the broker may not lend more than 50 percent of the purchase price of the securities being purchased, and further that the margin loan may not be unsecured or undersecured. (12 C.F.R. § 220.7.) It is submitted that Cantor, Fitzgerald's extensive, intimate participation in plaintiff's plan to obtain control of NJB by using 100 per cent borrowed funds constitutes an arrangement of credit by Cantor, Fitzgerald on terms which would be

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plainly illegal if employed directly by Cantor, Fitzgerald.*

34. Thus, the record developed in discovery makes it clear (a) that plaintiff intended to finance and has financed the vast bulk of its purchases with 100 per cent financing, including margin loans made by Cantor, Fitzgerald (Exhibit "B", p. 2; Exhibit "C", p. 1; Exhibit "D", p. 1) and later by Ladenburg, Thalmann & Co., Inc. (Exhibit "E", p. 1); (b) that the remainder of plaintiff's purchases has largely been financed with the proceeds of plaintiff's borrowings from the noteholders (*id.*); (c) that the noteholders' loans are unsecured or undersecured within the meaning of Regulation T (Exhibit "F", pp. 7, 8); and (d) that Cantor, Fitzgerald was aware at least from the time of the first 13D filings that plaintiff was not putting up its own moneys to finance its

* On the basis of deposition testimony, we now also have substantial indications that the D-Z deal also involved violations of Regulation G ("Securities Credit By Persons Other Than Banks, Brokers, or Dealers," 12 C.F.R. § 207) and Regulation U ("Credit By Banks For the Purpose of Purchasing or Carrying Margin Stocks" 12 C.F.R. § 221). However, in the interests of relative brevity herein, and because of the need for further discovery with respect to these matters, we are not presenting these points for purposes of the instant application.

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purchases but was using borrowed money to pay for the unmargined portion of its purchases.*

35. Moreover, it is now clear that Cantor, Fitzgerald was not merely acting as a broker in connection with plaintiff's purchases, but on the contrary, had from the beginning acted in close concert with Davis in formulating his plan to take over NJB, and arranging for its implementation.** Thus as has been set forth above, Cantor, Fitzgerald has at every step of plaintiff's attempt to acquire control of NJB played an active central role, including, inter alia, soliciting sources of financing, consulting with plaintiff about plaintiff's plans for NJB in the future, and apparently soliciting proxies on plaintiff's behalf to call a special shareholders meeting. (See ¶¶ 42-43, infra).

36. In sum, Cantor, Fitzgerald has acted in violation of both the letter and the spirit of the margin regulations by its conduct in simultaneously making margin loans and formulating and arranging for Davis' take-over attempt.

* Moreover, if these loans were secured, it seems clear that the noteholders are in flagrant violation of Regulation G which prohibits collateralized "purpose" loans by persons other than a broker or bank, since the note proceeds comprised more than 50 per cent of the funds used by plaintiff in its purchases.

** Moreover, documents produced by Cantor, Fitzgerald pursuant to our document demand include copies of plaintiff's "Private Placement Memorandum" and a form of the D-2 6 per-cent note -- suggesting that Cantor, Fitzgerald was completely aware of the unusual details of plaintiff's financing plan when it extended margin credit.

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D. Plaintiff is Engaged in a De Facto or "Creeping" Tender Offer
for the Shares of NJB in Violation of the Williams Act

37. Plaintiff's false and misleading 13D filings have obscured the now obvious fact that plaintiff has, from its inception, been conducting a tender offer for NJB in all but name. Thus, plaintiff was formed as a vehicle for acquiring control of NJB according to a specific, carefully calculated plan relying heavily on a continuing program of purchases of NJB shares, both on the American Stock Exchange and in the over-the-counter market -- to the extent shares were available in those markets -- and directly from large shareholders and through solicitation of specialists to the extent that was necessary to gain control. It is submitted that plaintiff, Cantor, Fitzgerald and their confederates have thereby been engaged in the very course of conduct which it was the purpose of the Williams Act to prohibit unless and until (a) investors and management have been fully and candidly advised of the offeror's identity, plans and intentions through the making of a formal tender offer pursuant to section 14(c) of the Securities Exchange Act, and (b) existing shareholders are assured of reasonable parity of treatment through the making of such an offer.

38. As has been fully set forth above, plaintiff's plan and course of conduct thereunder have not merely involved purchases from time to time, but have entailed the active solicitation of existing shareholders to sell their shares to plaintiff

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and have culminated in a standing order to Cantor, Fitzgerald to purchase -- for cash -- any and all shares of NJB that might become available. It is manifest that this activity is intended to have a major impact on the decisional process of NJB's shareholders, which may include the making of uninformed or ill-considered determinations to sell. This impact on investors is the very evil which the Williams Act was designed to prevent. Just as investors in the notes of plaintiff itself were not fully and fairly apprised of plaintiff's purposes and aims, so current and future shareholders of NJB are being denied the opportunity to make an informed investment decision by plaintiff's continuing failure to call its plan by its proper name -- a tender offer.

39. It is manifest that plaintiff has been attempting to do covertly and by indirection what it would not do directly -- namely, to make a tender offer for NJB shares without first meeting the requirements of section 14(c). Plaintiff and its accomplices should not be permitted to evade the clear intent of the law.*

* As noted earlier in this affidavit (See p.6, supra), evidence received as this affidavit was being finalized discloses that plaintiff has actually promulgated an intent to make a tender offer for 350,000 shares of NJB and has actually obtained a loan commitment of \$2,700,000 for this purpose. This evidence, which will be presented in detail in supplementary papers, conclusively establishes the illegality of plaintiff's "creeping tender offer" being conducted prior to public disclosure of plaintiff's true plans.

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E. Plaintiff and Its Confederates are Soliciting NJB Proxies
in Violation of the Securities Exchange Act.

40. Upon the limited discovery had to date, there are substantial grounds for believing that D-Z and Cantor, Fitzgerald have been engaged in the unlawful solicitation of proxies for a special shareholders meeting of NJB. It is becoming apparent that the convening of such a special meeting is an integral part of the D-Z plan to take control of NJB, and thus injunctive relief against such solicitations is necessary herein.

41. As set forth in the annexed affidavits of Allen Maki and Herbert M. Wachtell, proof has been developed that shareholders of NJB have been telephoned during the last month by a caller who advised them that he was calling them as shareholders of NJB for the purpose of obtaining their support to convene a special shareholders meeting. Thus, as is more fully set forth in the Maki affidavit, Mr. Maki was called by a "Mr. Schwartz" who solicited his proxy for this purpose. Likewise, as set forth in the Wachtell affidavit, Mr. George White, another NJB shareholder, was also called by a "Mr. Schwartz", who told Mr. White in substance that he was attempting to round up NJB shareholders to call a special meeting, that he had called "several others" for this purpose, and requested that Mr. White join in. Additionally, Mr. Harry G. Wiberg, Jr., another NJB shareholder was telephonically solicited for his proxy by a caller who wanted to oust the NJB management.

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42. There is every reason to believe that D-Z and Cantor, Fitzgerald are behind these proxy solicitations and that still other NJB shareholders were similarly solicited for their proxies. Thus, the deposition of Lawrence Orbe of Cantor, Fitzgerald revealed that: that firm has an employee named William Schwartz (0276); Schwartz had both a complete NJB shareholders list, and also two summary lists that had been specially prepared (the first of holders of 1,000-9,999 NJB shares and the second of holders of more than 10,000 NJB shares (0239)). Annexed hereto as Exhibits "H" and "I" respectively are copies of the two summary lists of NJB shareholders referred to in the Orbe testimony, which documents were produced from the Cantor, Fitzgerald files. Schwartz told Orbe that he used the shareholder list to contact two potential selling shareholders (0280-1, 283-4). Orbe then cautioned Schwartz not to call certain persons known to Orbe to be friendly to the NJB management (0286-7), the direct implication being that Schwartz was free to call other persons on the summary lists (0287).

43. It is extremely probative that the names of Messrs. Maki, White and Wiberg all appear on the Cantor, Fitzgerald list of NJB shareholders who hold more than 1,000 shares (Exhibit "H"). It should be noted that although Mr. Wiberg's name has been misspelled as "Wilberg" on Exhibit "H", there can be no doubt that based upon the address and first name and middle initial that Mr. Wiberg is the "Wilberg" referred to in Exhibit "H".

Affidavit of Bertram M. Kantor

44. There are ample grounds for concluding that a significant number of additional persons other than Messrs. Maki, White and Wiberg were also solicited. Thus, Mr. White was told by the caller that "several others" were contacted. (Wachtell Affidavit ¶2.) Mr. Maki was told that the caller represented "a proxy group". (Maki Affidavit ¶3.) Moreover, there is nothing particularly distinctive about the three shareholders who were known to have been contacted and there are over 50 other natural persons listed on the Cantor, Fitzgerald list as the owners of 1,000 shares or more. (Exhibit "H".) In addition, since a special meeting of NJB shareholders can be convened only at the call of at least 20 per cent of the shareholders, (0244) it is not clear there would be no purpose to soliciting only three shareholders.

45. It is thus submitted that there are ample grounds to support a determination at this time that Cantor, Fitzgerald on behalf of D-Z is and has been soliciting NJB proxies in clear contravention of section 14 of the Securities Exchange Act and Regulation 14A thereunder.

A PRELIMINARY INJUNCTION HEREIN IS REQUIRED TO RESTRAIN THE UNLAWFUL CONDUCT OF PLAINTIFF AND ITS CONFEDERATES WHICH OTHERWISE WILL CONTINUE TO THE IRREPARABLE INJURY OF NJB AND ITS SHAREHOLDERS.

46. It is submitted that discovery herein has disclosed

Affidavit of Bertram M. Kantor

evidence of wholesale violations of the federal securities laws. It has become apparent that plaintiff and its confederates have structured and conducted an attempt to take over NJB in total disregard of virtually every provision of law applicable to their take-over attempt. Upon the ultimate trial of the Trustees' counterclaims herein, after further intensive discovery by your deponent's firm, there is the highest probability that plaintiff will be adjudged by the Court to have committed the wholesale violations of law described herein.

47. Moreover, there can be no doubt whatsoever that plaintiff intends to pursue its unlawful takeover attempt unless and until restrained by this Court. Thus, plaintiff has given directions that purchases of NJB shares on its behalf should be made virtually without limit. Moreover plaintiff's refusal to accept even the conditional stay ordered herein by Judge Ward on July 9 -- and the striking facts that plaintiff purchased 1,100 NJB shares in the two or three hours of trading that remained after Judge Ward vacated his stay on July 12, coupled with plaintiff's continued purchases of NJB shares this week -- are eloquent evidence of plaintiff's resolute determination. It is thus manifest that absent action by this Court NJB faces the damages of falling under plaintiff's domination or control.

48. No previous application has been made for the relief requested herein.

Affidavit of Bertram M. Kantor

WHEREFORE, your deponent respectfully submits that
the preliminary injunction sought herein should issue.

Bertram M. Kantor
Bertram M. Kantor

Sworn to before me this
19th day of July, 1974.

Charles L. Forch

CHARLES L. FORCH
Notary Public, State of New York
No. 60-3134970 Westchester County
Cort. Filed in New York County
Commission Expires March 30, 1975

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EXHIBIT A--LETTER OF INTENT BETWEEN DAVIS AND SILVERSTEIN
ANNEXED TO AFFIDAVIT OF BERTRAM M. KANTOR

BARRY SILVERSTEIN
ONE OCEAN BOULEVARD
CANTONETA, FLORIDA 33501

March 21, 1974

Mr. Bruce R. Davis

Dear Bruce:

This is to confirm that we will proceed to investigate the making of a tender offer for NJB Prime, a Massachusetts real estate investment trust. The basis for our participation is as follows:

A tendering entity will be formed to be owned as follows:

- 51 % by the Bruce Davis interests
- 49 % by the Barry Silverstein interests

The capitalization of the tendering entity is contemplated to be as follows:

On the assumption that 51% of the shares of the target company will be purchased at approximately \$9.00 per share, the Davis interests will put in at least \$500,000 and possibly up to \$1 million (it is understood that the Silverstein group will use their best efforts to keep the Davis interests at the \$500,000 level) with the remainder of the funds to be put up by the Silverstein interests in debt form. The Davis interests' \$500,000 will be subordinated in all respects to the Silverstein money. In addition, all the stock acquired will be pledged to the Silverstein interest, carrying an interest rate of approximately 3% over prime or 12% based upon present prime. Bruce Davis personally and Security Management Co. will guarantee the payment of the interest to the Silverstein interests if the shares acquired by the tendering entity do not yield the sum sufficient to cover the interest on the Silverstein debt.

In the event that shares in excess of 51% are tendered, the Silverstein group and the Davis group shall have the option to purchase such shares in excess of 51%, pro rata, such purchase may be made by an entity other than the tendering entity.

DEPT
TRUSTEE EXHIBIT 13 FOR IDENT.
7/10/82 I. H. BERLIN

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Exhibit A Annexed to Affidavit of Bertram M. Kantor

BARREY SILVERSTEIN
ONE OCEAN BOULEVARD
PALM BEACH, FLORIDA 33481

Mr. Bruce R. Davis

March 21, 1974

Page #2

The tender entity will initially be funded by Davis' \$500,000, or such lesser sum as appears reasonable to cover the expenses of the tender offer, plus a promissory obligation on the part of the Silverstein group to come up with their share of the funds required by the tender on or before its consummation.

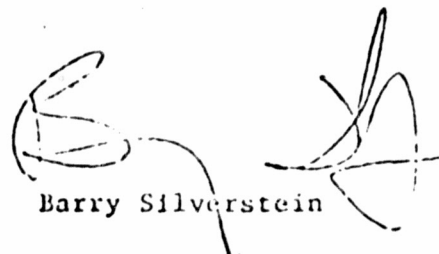
It is contemplated among other alternatives, with no particular preference being given to this alternative, that the tendering entity may attempt to gain voting control of 2/3 of the then outstanding shares of beneficial interest. The purpose of this control will be to vote to change the status of NJB from a REIT to an ordinary operating corporation.

Once this has been accomplished, it may be further desirable to have the tendering entity exchange its stock in NJB for stock in Security Management Co. which simultaneously would be merged into NJB. The result of this would be a transfer of the initial debt used in the tender offer to NJB.

Davis and Silverstein, after consulting with appropriate advisors, will determine what percentage of the stock must be acquired for control. In the event that that said percentage is less than 51%, the above mentioned capitalization of the tendering entity would be effected.

In the event that the trust form of ownership is not changed to a corporate status prior to our discharging the present advisor, it is agreed that the advisor to be formed will be owned in the same proportion as each interest appears in the tendering entity.

Sincerely yours,



Barry Silverstein

ACKNOWLEDGED:

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Bruce R. Davis

EXHIBIT B--ORBE LETTER DATED MARCH 19, 1974 ANNEXED
TO AFFIDAVIT OF BERTRAM M. KANTOR

March 19, 1974

Mr. Norman Brasser
Chairman of the Board
New Jersey Bank, N.A.
657 Main Avenue
Passaic, N.J. 07655

Re: NJB Prime Investors

Dear Mr. Brasser:

I would like to express on behalf of our client a genuine interest in acquiring for cash 51% or more of the shares of beneficial interest of NJB Prime Investors.

Our client is a strong company with access to considerable financial backing. The company's present lines of business are fully compatible with NJB Prime Investors. Our client recognizes that the current market price of the shares of NJB Prime in no way reflects intrinsic values. We are prepared to bear this in mind in any negotiations.

I understand the sensitive nature of your position in this matter, and I will treat your reply to this letter as completely confidential. I would very much like to sit down and discuss this matter at your convenience.

Sincerely,

Lawrence F. Orbe III
Vice President

LFO:bjb

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PROSCE EXHIBIT 12 FOR IDENL
7/17/74 L. M. KANTOR

EXHIBIT C--SCHEDULE 13D FILING OF D-Z ANNEXED TO
AFFIDAVIT OF BERTRAM M. KANTOR

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

SCHEDULE 13D

Pursuant to Section 13 (d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z INVESTMENT COMPANY
420 14th Street N. W.
Atlanta, Georgia 30318

Address copies of all communications to:

JOSEPH B. RUSSELL, ESQ.
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

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Exhibit C Annexed to Affidavit of Bertram M. Kantor

ITEM 1. SECURITY AND ISSUER.

This statement relates to Shares of Beneficial Interest, without par value ("Shares"), of NJB Prime Investors ("NJB"), a Massachusetts business trust, 950 Clifton Avenue, Clifton, New Jersey 07013.

ITEM 2. IDENTITY AND BACKGROUND.

This statement is filed by D-Z Investment Company ("D-Z"), a Delaware corporation having its principal office at 420 14th Street N.W., Atlanta, Georgia 30318.

The officers and directors of D-Z and their business and residence addresses are as follows:

<u>NAME</u>	<u>BUSINESS ADDRESS</u>	<u>RESIDENCE ADDRESS</u>
Bruce R. Davis	420 14th St. N.W. Atlanta, Ga. 30318	4332 Conway Valley Ct. N.W. Atlanta, Ga. 30327
Jerome Zimmerman	1260 Foster St. N.W. Atlanta, Ga. 30318	3144 Wood Valley Rd.N. Atlanta, Ga. 30327
Ralph M. Becker	420 14th St. N.W. Atlanta, Ga. 30318	23 Old Ivy Square Atlanta, Ga.
Saul Becker	800 Peachtree St.N.E. Atlanta, Ga. 30308	380 Valley Rd.N.W. Atlanta, Ga. 30305

The voting stock of D-Z is owned in equal shares by Jerome Zimmerman and by Security Management Co., Inc. ("Security"), a Georgia corporation having its principal office at 420 14th Street N.W., Atlanta, Ga. 30318. Security is engaged in real estate development and management, apartment and condominium construction and the sale of land. Mr. Zimmerman and Security may each be deemed to be a person "controlling" D-Z, as that term is defined in the

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Exhibit C Annexed to Affidavit of Bertram M. Kantor

control of NJB and for the best interests of NJB. Such future actions may include:

(i) Acquisition of additional NJB shares, either alone or in conjunction with others, through private or open market transactions, or through formal tender offer, when opportune situations to do so arise (which acquisitions will depend upon the availability of NJB Shares on the open market, the willingness of holders of large blocks to sell their shares and general economic and market conditions);

(ii) Seeking representation on the Board of Trustees by means of solicitation of proxies or otherwise;

(iii) Joining with other shareholders, or other persons or groups, in a common effort to influence management of or obtain control of NJB; and/or

(iv) Seeking to change the investment advisory arrangements of NJB.

Should D-Z, alone or in conjunction with others, obtain control of NJB, it intends, subject to a study of all of NJB's assets and all other relevant circumstances then obtaining, to consider the possible disposition of certain assets of NJB and the effecting of changes in its lending policies with a view to improving the operating results of NJB and, subject to further review of NJB's assets and all other relevant circumstances, D-Z believes it may then be desirable to recommend one or more of the following:

(a) Discontinuing the status of NJB as a real estate investment trust (unless and until it is determined to effect such discontinuance, it is not the intention of D-Z to take any action which would jeopardize NJB's status as a real estate investment trust

Exhibit C Annexed to Affidavit of Bertram M. Kantor

applicable rules and regulations under the Securities Exchange Act of 1934, as amended.

Information concerning the present principal occupations, and the material occupations during the past ten years, of each of the officers and directors of D-Z is set forth in Schedule A hereto annexed. None of D-Z's directors or officers above named has during the past ten years been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors).

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this report approximately \$468,393 has been expended by D-Z for the purchase of the NJB Shares referred to in Item 5, below. \$254,783 thereof was paid out of D-Z's own funds, which funds were obtained by D-Z in a private placement of its 6% promissory notes, due March 31, 1975, which notes were sold to the persons and in the amounts set forth in Schedule B hereto annexed. The balance of the purchase cost was obtained by margin borrowings of \$3 per share from Cantor, Fitzgerald & Co., Inc., 232 No. Canon Drive, Beverly Hills, Calif., secured by pledge of the NJB Shares purchased.

ITEM 4. PURPOSE OF TRANSACTION.

In purchasing NJB Shares, it is the intention of D-Z to acquire a sufficient ownership interest in NJB to influence management decisions and, ultimately, to determine the management and policies of NJB. Depending upon future circumstances not now known, D-Z may take such action from time to time as it may deem appropriate, in the light of future developments, in order to obtain

Exhibit C Annexed to Affidavit of Bertram M. Kantor

under the applicable provisions of the Internal Revenue Code, as amended);

(b) If a study proves that a combination may be effected upon appropriate terms in the best interest of all parties concerned, to effect a merger, consolidation or other combination of NJB with D-Z and/or with Security; and/or

(c) The acquisition by NJB of other real estate investment trusts by purchase, merger or otherwise on such terms as may be in the best interests of NJB and its shareholders (although it should be noted that D-Z does not have any present plans or proposals to that end, nor has management of D-Z determined which, if any, other such trusts might be so acquired).

Except as mentioned above, D-Z has no present intention, nor has it in any event formulated any specific plan or proposal, to liquidate NJB or to make any major change in its business or structure.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

As a result of purchases made prior to and on April 23, 1974, D-Z became the beneficial owner on that date of 65,600 NJB Shares, representing approximately 5.14% of the total number of shares (1,276,053) which are reported by NJB in its Annual Report on Form 10-K for the year ended November 30, 1973 as outstanding on November 30, 1973. Except for the NJB Shares described in the table below, D-Z not own beneficially, nor does it have the right to acquire, directly or indirectly, any NJB Shares.

During the last sixty (60) days, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB

Exhibit C Annexed to Affidavit of Bertram M. Kantor

Shares other than purchases, as follows:

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19	1,000
April 22	4,600
April 23	60,000
April 26	5,400
May 2	200

Except for the purchase made on April 23, which was over the counter, all of the above purchases were made on the American Stock Exchange.

ITEM 6. CONTRACTS, ARRANGEMENTS, OR UNDERSTANDINGS WITH
RESPECT TO SECURITIES OF THE ISSUER.

Neither D-Z nor any of its officers or directors is a party to any contracts, arrangements or understandings with any person with respect to any securities of NJB, except that Cantor, Fitzgerald & Co., Inc. has been retained to render certain services in connection with D-Z's purchases of NJB Shares, for which it is to receive a fee of \$30,000 plus out-of-pocket expenses which are at present estimated at approximately \$3,000. In addition, Cantor, Fitzgerald & Co., Inc., as an exclusive purchasing agent, will receive a fee equal to 5% of the purchase price payable in respect of all NJB Shares purchased on behalf of D-Z, and any brokerage commissions payable will be paid out of that fee.

ITEM 7. PERSONS RETAINED, EMPLOYED OR TO BE COMPENSATED.

Not applicable.

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Exhibit C Annexed to Affidavit of Bertram M. Kantor

ITEM 8. MATERIAL TO BE FILED AS EXHIBITS.

Letter Agreement dated April 25, 1974 between Security
and Cantor, Fitzgerald & Co., Inc.

SIGNATURE

The undersigned corporation certifies that to the best
of its knowledge and belief the information set forth in this
statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By 

Jerome Zimmerman
Vice President

May 3, 1974

Exhibit C Annexed to Affidavit of Bertram M. Kantor

SCHEDULE A

Information regarding the present principal occupations and the material occupations for the past ten years of the officers and directors of D-Z Investment Company is as follows:

Bruce R. Davis: President and Director of D-Z; Chairman of

the Board of Security Management Co., Inc. (since October 1969); Executive Vice President of Pioneer Development Corporation, Atlanta, Ga. (October 1968 to October 1969); Secretary of Security Development and Investment Company (October 1963 to October 1968).

Jerome Zimmerman: Vice President and Director of D-Z; President of Apollo Forest Products, Inc. (lumber distributor) (since February 1973); Private Investor (June 1969 to February 1973); General Manager of Delmar Division, U. S. Plywood Corp. (cabinet manufacturers) (September 1966 to June 1969) and President of Delmar Cabinet Co., Inc. (September 1966 to September 1966); President of Union Lumber Co., Inc. (lumber manufacturers and distributors) (December 1948 to September 1966); President of E & L Services, Inc. (apartment management) (since March 1966).

Ralph M. Becker: Treasurer, Secretary and Director of D-Z; President of Security Management Co., Inc. (since 1972); President of Dixie Shoe Corporation, Eufaula, Ala. (shoe manufacturing) (since 1963); Partner of R & S Management Co., Atlanta, Ga. (real estate management) (since 1967); President of Miracle City Stores Co., Huntsville, Ala. (shopping center) (since 1962).

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Exhibit C Annexed to Affidavit of Bertram M. Kantor

Saul Becker: Vice President and Director of D-Z; Director of Security Management Co., Inc. (since 1973); Secretary and Treasurer, Dixie Shoe Corporation (since 1963) and of Miracle City Stores Co. (since 1962); Partner of R & S Management Co., Atlanta, Ga. (since 1967); President of First Fidelity Realty Group, Ltd. (real estate broker) (since 1973); Southeastern Regional real estate manager, Marx Realty & Improvement Co., Inc. Atlanta, Ga. (1956 to 1973).

SCHEDULE B

Information regarding the purchasers of the 6% promissory notes referred to in Item 3 hereof is as follows:

<u>NAME AND ADDRESS OF PURCHASER</u>	<u>PRINCIPAL AMOUNT</u>
Security Management Co., Inc. 420 Fourteenth St., N. W. Atlanta, Georgia 30318	\$ 50,000
Jerome Zimmerman 1260 Foster Street, N. W. Atlanta, Georgia	50,000
Bernard Kroll 100 Colony Square Suite 2300 Atlanta, Georgia	50,000
Max Sophier 2575 Peachtree St., N. E. Atlanta, Georgia 30305	50,000
Harold Levow 1235 Mt. Paran Road, N. W. Atlanta, Georgia	50,000
Harold B. Levin, M. D. 1293 Peachtree St., N. E. Atlanta, Georgia 30309	50,000
Harvey Jacobson 3236 E. Wood Valley Rd., N. W. Atlanta, Georgia 30327	50,000

Exhibit C Annexed to Affidavit of Bertram M. Kantor

I, the undersig. BT, Secretary of D-Z Invest. Co Company, hereby certify the following to be a true and correct copy of a resolution duly adopted by the Board of Directors of said Corporation by unanimous written consent without a meeting on the 26 day of April, 1974, and that the same has not in any way been modified, amended, or revoked, and remains in full force and effect:

RESOLVED, that the President or any Vice President of this Corporation be and each hereby is authorized to sign on behalf of the Corporation and to file with the Securities and Exchange Commission any and all such documents, including an Information Statement on Schedule 13D and one or more amendments thereto, as may be necessary or appropriate pursuant to the Securities Exchange Act of 1934, as amended, in connection with the purchase by or on behalf of this Corporation of shares of beneficial interest of NJB Prime Investors, or in connection with the ownership of such shares, hereby ratifying and confirming all that any such officer may hereafter do in the premises.

I further certify that the persons named below now occupy the offices set forth opposite their names:

<u>NAME</u>	<u>OFFICE</u>
Bruce R. Davis	President
Saul Becker	Vice President
Jerome Zimmerman	Vice President
Ralph M. Becker	Secretary/Treasurer

WITNESS my signature and the seal of said Corporation, this 26 day of April, 1974.

ONLY COPY AVAILABLE Bertram M. Kantor, Secretary

EXHIBIT D--AMENDMENT NO. 1 TO SCHEDULE 13D ANNEXED
TO AFFIDAVIT OF BERTRAM M. KANTOR

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

AMENDMENT NO. 1

to

SCHEDULE 13D

Pursuant to Section 13 (d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z INVESTMENT COMPANY
420 14th Street N. W.
Atlanta, Georgia 30318

Address copies of all communications to:

JOSEPH B. RUSSELL, ESQ.
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

Items 3 and 5, and Schedule B annexed.

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Exhibit D Annexed to Affidavit of Bertram M. Kantor

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this report approximately \$519,036 has been expended by D-Z for the purchase of the NJB Shares referred to in Item 5, below. \$285,536 thereof was paid out of D-Z's own funds, which funds were obtained by D-Z in a private placement of its 6% promissory notes, due March 31, 1975, which notes were sold to the persons and in the amounts set forth in Schedule B hereto annexed. The balance of the purchase cost was obtained by margin borrowings of \$3 per share from Cantor, Fitzgerald & Co., Inc., 232 No. Canon Drive, Beverly Hills, California, secured by pledge of the NJB Shares purchased.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

As a result of purchases made prior to and on April 23, 1974, D-Z became the beneficial owner on that date of 65,600 NJB Shares, representing approximately 5.14% of the total number of shares (1,276,053) which are reported by NJB in its Annual Report on Form 10-K for the year ended November 30, 1973 as outstanding on November 30, 1973. Except for the NJB Shares described in the table below, D-Z does not own beneficially, nor does it have the right to acquire, directly or indirectly, any NJB Shares.

During the sixty (60) days preceding the filing of the statement to which this amendment relates, and since such filing, neither D-Z nor any person affiliated with D-Z has effected any

Exhibit D Annexed to Affidavit of Bertram M. Kantor

transaction in NJB Shares other than purchases, as follows:

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19	1,000
April 22	4,600
April 23	60,000
April 26	5,400
May 2	200
May 6	3,200
May 10	900
May 14	2,000
May 16	1,200
TOTAL	<u>78,500</u>

Except for the purchase made on April 23, which was over the counter, all of the above purchases were made on the American Stock Exchange.

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By B. R. Davis

Bruce R. Davis
President

May 21, 1974

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Exhibit D Annexed to Affidavit of Bertram M. Kantor

SCHEDULE B

Information regarding the purchasers of the 6% promissory notes referred to in Item 3 hereof is as follows:

<u>NAME AND ADDRESS OF PURCHASER</u>	<u>PRINCIPAL AMOUNT</u>
Security Management Co., Inc. 420 Fourteenth St., N. W. Atlanta, Georgia 30318	\$ 50,000
Ernest Zimmerman 1260 Foster Street, N.W. Atlanta, Georgia	50,000
Bernard Kroll 100 Colony Square Suite 2300 Atlanta, Georgia	100,000
Max Sophier 2575 Peachtree St., N.E. Atlanta, Georgia 30305	50,000
Arnold Levow 1235 Mt. Paran Road, N. W. Atlanta, Georgia	50,000
Arnold B. Levin, M. D. 1293 Peachtree St., N. E. Atlanta, Georgia 30309	50,000
Levy Jacobson 3236 E. Wood Valley Rd., N. W. Atlanta, Georgia 30327	50,000
Isidore Weinberg 501 Ivy Road, N. E. Atlanta, Georgia	50,000

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EXHIBIT E--AMENDMENT NO. 2 TO SCHEDULE 13D ANNEXED
TO AFFIDAVIT OF BERTRAM M. KANTOR

SECURITIES AND EXCHANGE COMMISSION -1-

Washington, D. C. 20549

AMENDMENT NO. 2

to

SCHEDULE 13D

Pursuant to Section 13 (d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z Investment Company
420 14th Street N.W.
Atlanta, Georgia 30318

Address copies of all communications to:

Joseph B. Russell, Esq.
Rubin Wachtel Baum & Levin
508 Madison Avenue
New York, N. Y. 10022

Amending Items 3 and 5.

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Exhibit E Annexed to Affidavit of Bertram M. Kantor

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this amendment, approximately \$661,780 has been expended by D-Z for the purchase of the NJB Shares referred to in Item 5, below. \$261,780 thereof was paid out of D-Z's own funds, which funds were obtained by D-Z in a private placement of its 6% promissory notes, due March 31, 1975, which notes were sold to the persons and in the amounts set forth in Schedule B hereto annexed. The balance of the purchase cost was obtained by margin borrowings of \$3 per share from Cantor, Fitzgerald & Co., Inc., 232 No. Canon Drive, Beverly Hills, California, secured by pledge of the NJB Shares purchased.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

As a result of purchases made prior to and on April 23, 1974, D-Z became the beneficial owner on that date of 65,600 NJB Shares, representing approximately 5.14% of the total number of shares (1,270,053) which are reported by NJB in its Annual Report on Form 10-K for the year ended November 30, 1973 as outstanding on November 30, 1973. Except for the NJB Shares described in the table below, D-Z does not own beneficially, nor does it have the right to acquire, directly or indirectly, any NJB Shares.

During the sixty (60) days preceding the filing of the statement to which this amendment relates, and since such filing, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB Shares other than purchases, as follows:

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Exhibit E Annexed to Affidavit of Bertram M. Kantor

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19	1,000
April 22	4,600
April 23	60,000
April 26	5,400
May 2	200
May 6	3,200
May 10	900
May 14	2,000
May 16	1,200
May 24	19,000
May 28	10,000
TOTAL	<u>107,500</u>

Except for the purchase made on April 23, which was over the counter, all of the above purchases were made on the American Stock Exchange.

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By Bruce R. Davis
 Bruce R. Davis
 President

June 3, 1974

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EXHIBIT F--AMENDMENT NO. 3 TO SCHEDULE 13D ANNEXED
TO AFFIDAVIT OF BERTRAM M. KANTOR

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

AMENDMENT NO. 3

to

SCHEDULE 13D

Pursuant to Section 13(d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJD PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z Investment Company
420 14th Street N. W.
Atlanta, Georgia 30318

Address copies of all communications to:

Joseph B. Russell, Esq.
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

Amending Items 3 and 5, and Schedule B

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Exhibit F Annexed to Affidavit of Bertram M. Kantor

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION

As of the date of this amendment, approximately \$532,100 has been expended by D-Z for the purchase of the 158,100 NJB Shares referred to in Item 5, below. Approximately \$532,100 thereof was paid out of D-Z's own funds, of which \$500,000 was obtained by D-Z in a private placement of its 6% promissory notes, due March 31, 1975, to the purchasers and in the amounts set forth in Schedule B, and \$75,000 was advanced by Bruce R. Davis. The balance of the purchase cost was obtained by margin borrowings from Cantor, Fitzgerald & Co., Inc., Beverly Hills, California, and from Ladenburg, Thalmann & Co., New York, N. Y., in each case (except for 5,400 shares purchased for cash) secured by pledge of the NJB Shares purchased through such broker.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

As a result of purchases made prior to and on April 23, 1974, D-Z became the beneficial owner on that date of 65,600 NJB Shares, representing approximately 5.14% of the total number of shares (1,276,053) reported by NJB in its Annual Report on Form 10-K for the year ended November 30, 1973 as outstanding on November 30, 1973. Except for the 158,500 NJB Shares referred to above and in the table below, D-Z does not own beneficially, nor does it have the right to acquire, directly or indirectly, any NJB Shares.

Following the filing of the statement to which this amendment relates, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB Shares, other than purchases, as follows:

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SCHEDULE B

Information regarding the purchasers of the 6% promissory notes referred to in Item 3 hercof is as follows:

<u>NAME AND ADDRESS OF PURCHASER</u>	<u>PRINCIPAL AMOUNT</u>
Security Management Co., Inc. 420 Fourteenth St., N. W. Atlanta, Georgia 30319	\$ 50,000
Jerome Zimmerman 1260 Foster Street, N. W. Atlanta, Georgia	50,000
Bernard Kroll 100 Colony Square Suite 2300 Atlanta, Georgia	100,000
Max Sophier 2575 Peachtree St., N. E. Atlanta, Georgia 30305	50,000
Harold Levow 1235 Mt. Paran Road, N. W. Atlanta, Georgia	50,000
Harold B. Levin, M. D. 1293 Peachtree St., N. E. Atlanta, Georgia 30309	50,000
Harvey Jacobson 3236 E. Wood Valley Rd., N. W. Atlanta, Georgia 30327	50,000
Seymour Weinberg Old Ivy Road, N. E. Atlanta, Georgia	50,000
Ronald D. Feinman 5310 London Drive, N. W. Atlanta, Georgia	50,000

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EXHIBIT G--PRIVATE PLACEMENT MEMORANDUM ANNEXED TO
AFFIDAVIT OF BERTRAM M. KANTOR

April 24, 1974

D-Z INVESTMENT COMPANY

PRIVATE PLACEMENT MEMORANDUM

FOR ISSUANCE OF

UP TO \$1,250,000 OF

6% PROMISSORY NOTES DUE

MARCH 31, 1975

THE COMPANY: D-Z Investment Company (the "Company"), a Delaware corporation, incorporated April 23, 1974, as a close corporation pursuant to Section 342 of the General Corporation Law of Delaware. Authorized Capital Stock - 10,000 shares of \$100 par value.

The capital stock is presently owned as follows:

Security Management Co., Inc., a Georgia corporation,
420 14th Street N.W., Atlanta, Georgia - 50 shares.

Mr. Jerome Zimmerman, c/o Apollo Forest Products,
1260 Foster Street N.W., Atlanta, Georgia - 50 shares.

The members of the Board of Directors of the Company are: Bruce R. Davis, Saul Becker, Ralph Becker, and Jerome Zimmerman.

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TRUSTEE EXHIBIT 5 ONLY COPY AVAILABLE
7/15/74 I. H. BENJAMIN FOR IDENT.

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Exhibit G Annexed to Affidavit of Bertram M. Kantor

Bruce R. Davis is Chairman of the Board of Security Management Co., Inc. ("Security"); Ralph Becker is its President. The two of them and Saul Becker are also directors of Security.

The officers of the Company are:

President - Bruce R. Davis

Vice President and Asst. Secretary - Jerome Zimmerman

Vice President and Asst. Secretary - Saul Becker

Secretary and Treasurer - Ralph Becker.

As a close corporation under Delaware law all of the issued and outstanding shares of all classes of stock shall be held by not more than thirty (30) persons as defined in Section 342 of the General Corporation Law and the ownership of stock in the Company is subject to the provisions of the Articles of Incorporation (which may be amended from time to time), an excerpt of which is set forth in Exhibit 1 attached hereto.

PROMISSORY NOTES TO BE ISSUED: The Company will issue up to One Million Two Hundred Fifty Thousand Dollars (\$1,250,000) of its six percent (6%) Promissory Notes due March 31, 1975 ("notes"). Interest will be paid on maturity. The Company shall have the right to prepay the notes without penalty. The form of the note is attached hereto as Exhibit 2.

Exhibit G Annexed to Affidavit of Bertram M. Kantor

The notes are being offered and sold without registration under the Securities Act of 1933, as amended, in reliance upon the exemption from registration for nonpublic offerings. The availability of such exemption depends in part upon the accuracy of certain representations, declarations, and warranties which a purchaser will be required to make. The form of the Certificate and Purchase Order setting forth the required representations, declarations and warranties to be executed by each purchaser is attached hereto as Exhibit 3. The Company shall have the right to rely upon such Certificate in determining the suitability of a prospective note purchaser.

The notes are being offered and sold without registration under the Georgia Securities Act of 1973, as amended, in reliance upon the exemption from registration pursuant to Section 8(j) of said Act which exempts from registration negotiable instruments maturing in not more than twelve (12) months from date of issue and sold without the same being offered for sale by means of advertisements publicly disseminated in the news media or through the mails.

Security and Jerome Zimmerman have each agreed to purchase \$50,000 of the Notes.

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BUSINESS ACTIVITY OF THE COMPANY: Initially the Company intends to acquire an interest in a real estate investment trust ("REIT"). In order to retain the confidentiality of the acquisition so that purchases may be at the most favorable prices, the Company does not intend to disclose the name of the REIT whose stock is and will be accumulated until such time as the Company is required to disclose such information in accordance with Section 13 of the Securities Exchange Act. The Company will be required to file an appropriate disclosure statement with the Securities and Exchange Commission, the REIT and each exchange where the REIT's stock is traded, within ten (10) days after the Company has acquired in excess of five percent (5%) of the outstanding stock of the REIT. This disclosure is expected within ten days from the date hereof. A copy of the disclosure statement will be delivered to each person who purchases a note of the Company.

It is the intention of the Company to acquire a sufficient ownership interest in the REIT to influence management decisions and, if necessary, replace management. To be successful, the Company may have to conduct a proxy contest. The Company's intentions are subject to its ability to acquire the stock of the REIT through private purchases or purchases on the

Exhibit G Annexed to Affidavit of Bertram M. Kantor

open market. Such ability depends upon the availability of stock on the open market, the willingness of holders of large blocks of stock to sell their shares, and general economic and market conditions. Accordingly, the Company cannot give any assurance or representation that it will be able to carryout its intention to acquire such an ownership interest.

Real estate investment trusts are presently under severe pressures, primarily because of high interest rates they must pay for short term money and the increasing number of defaults by their borrowers without adequate provision for loss reserves. Many of the stocks of real estate investment trusts are selling at approximately 25% of their reported book value after taking into consideration increased reserves for losses.

Inasmuch as the Company will be making its acquisitions only on the basis of known public information and the Company's analysis of that information, the actual status of the trust whose stock will be acquired and what direction the Company will recommend to the trust or what benefits may accrue to the Company can only be assumptions until such time it is in a position to have more detailed and complete information. The Company believes, however, that the information it presently has and the depressed value of the stock offers an opportunity for substantial success.

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If the Company is successful in gaining a position of influencing the management of the REIT whose stock it may acquire, it will encourage the REIT to acquire other real estate investment trusts by purchase or merger.

The Company believes that substantial reductions in the cost of management of one or more real estate investment trusts can be obtained.

The Company, at a subsequent date, may consider the merger into the REIT in which it may acquire a substantial interest, or security or both. The Company is not in a position at this date to state what it will ultimately do in these respect.

USE OF PROCEEDS FROM NOTES: It is expected that substantially all of the proceeds from the issuance of the Six Percent Promissory Notes due March 31, 1975 will be used to purchase stock in the selected real estate investment trust on margin and pay all of the related costs of acquisition, including legal and other expenses related to such purchases, such as interest on any margin debt.

The stock purchased by the Company will be collateral for the margin debt.

Other than the \$100,000 to be received by the Company from the issuance of notes to Security and Jerome Zimmerman, the Company will not use any of the proceeds from the issuance of

Exhibit G Annexed to Affidavit of Bertram M. Kantor

the notes until proceeds of at least \$500,000 are received. If such proceeds are not received prior to May 15, 1974, all of the proceeds from the issuance of such notes shall be returned without interest.

The Company's ability to repay the notes is dependent upon (i) the dividends it receives from the real estate investment trust whose stock is acquired; (ii) the ultimate sale of such stock; (iii) the merger with such real estate investment trust and the repayment of the notes by the real estate investment trust; (iv) the sale of Company stock and promissory notes described under the heading ISSUE OF UNITS UNDER SMALL ISSUE REGISTRATION; or a combination of two or more of the foregoing.

SCHEDULE 13D TO BE FILED WITH THE SECURITIES AND EXCHANGE COMMISSION, ETC. REQUIRES THE COMPANY TO STATE THE SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION USED OR TO BE USED IN PURCHASING SHARES OF A PUBLICLY HELD COMPANY. THE NAMES OF THE HOLDERS OF THE NOTES AND THE AMOUNTS BORROWED BY THE COMPANY WILL BE INCLUDED IN THE COMPANY'S DISCLOSURE STATEMENT.

ISSUE OF UNITS UNDER SMALL ISSUE REGISTRATION: The Company intends prior to September 1, 1974, to register for sale with the Georgia Securities Commissioner units consisting of

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common stock and two year 6% promissory notes, pursuant to Section 5(d) of the Georgia Securities Act of 1973, as amended, which section is known as the Small Issue Registration whereby securities are sold to not more than twenty-five (25) persons. It is contemplated that not more than 25 units (each unit consisting of four (4) shares of \$100 par value common stock of the Company and \$45,000 of two year 6% promissory notes) will be sold at \$50,000 per unit pursuant to a registration statement filed pursuant to Section 5(d) of said Act. Of the \$50,000 allocated to the four shares of \$100 par value common stock, \$400 will be allocated to the capital stock and \$4600 to capital surplus.

Such units will not be registered under the Securities Act of 1933, as amended, as the Company intends to rely upon the exemption from registration for nonpublic offerings.

Until such time as the 6% promissory notes due March 31, 1975, are paid or the units described in this section are sold, Security and Jerome Zimmerman will deposit the shares of the Company owned by them in escrow with Mercantile National Bank, Atlanta, Georgia as security for either the payment of said 6% promissory notes due March 31, 1975 or the registration of the units described above.

Nothing herein shall be considered as a representation

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for assurance that the Georgia Securities Commissioner will not issue a "stop order" pursuant to Section 5(d)(5) of said Georgia Securities Act of 1973 with respect to the sales of the units.

EXHIBIT 1
to
Private Placement Memorandum

All of the issued and outstanding stock of all classes shall be held of record by not more than thirty (30) percent, as defined in section 342 of the General Corporation Law; and the corporation shall make no offering of any of its stock of any class which would constitute a "public offering" within the meaning of the United States Securities Act of 1933, as it may be amended from time to time; and the consent of the directors of the corporation shall be required to approve the issuance or transfer of any shares as being in compliance with the foregoing restrictions.

No holder of shares shall sell, assign or otherwise dispose of any share or shares of stock of this corporation to person, firm, corporation or association, nor shall the executive administrator, trustee, assignee or other legal representative of a deceased stockholder sell, assign, transfer or otherwise dispose of any share or shares of the stock of this corporation to any person, firm, corporation or association nor to any next of kin or legatee or legatees of a deceased stockholder, without first offering said share or shares of stock for sale to the

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EXHIBIT 1

(p. 2)

to

Private Placement Memorandum

corporation at a price representing the true book value thereof at the time of said offer and the corporation shall have the right to purchase the same by the payment of such purchase price at any time within thirty (30) days after receipt of written notice of said offer. In the event that the corporation does not accept the offer to sell such share or shares within thirty (30) days after receipt of the written notice of said offer, the share or shares shall next be offered for sale to the other stockholder or stockholders of said corporation at a price representing the true book value thereof at the time of said offer and such other stockholder or stockholders shall have the right to purchase the same by the payment of such purchase price at any time within thirty (30) days after receipt of written notice of said offer.

Compliance with the foregoing terms and conditions in regard to the sale, assignment, transfer or other disposition of the shares of stock of this corporation shall be a condition precedent to the transfer of such shares of stock on the books of this corporation.

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EXHIBIT 2

D-Z INVESTMENT COMPANY

6% PROMISSORY NOTE

DUE MARCH 31, 1975

Atlanta, Georgia

\$ _____, 1974

FOR VALUE RECEIVED, the undersigned D-Z INVESTMENT COMPANY (hereinafter sometimes referred to as the "Corporation" or the "Borrower") a corporation organized and existing under the laws of the State of Delaware, hereby promises to pay to the order of _____, the principal amount of _____ Dollars (\$ _____) on March 31, 1975, with interest (computed on the basis of a 365 day year) on the unpaid balance of such principal amount from the date hereof at the rate of six (6%) per cent per annum until the same shall become due and payable, and with interest on any overdue principal and on any overdue interest, if any be due and payable (to the extent permitted under applicable law), at the rate of ten (10%) per cent per annum, payable on demand.

THIS PROMISSORY NOTE IS A SECURITY WITHIN THE MEANING OF THE FEDERAL AND GEORGIA SECURITIES LAWS. IT HAS NOT BEEN REGISTERED UNDER THE FEDERAL SECURITIES ACT OR THE SECURITIES ACT OF ANY STATE. THIS PROMISSORY NOTE IS BEING ACQUIRED BY THE HOLDER FOR INVESTMENT PURPOSES ONLY AND NOT FOR RESALE. NO SUCH NOTE MAY BE SOLD, OFFERED FOR SALE, ASSIGNED, OR TRANSFERRED UNLESS A REGISTRATION STATEMENT UNDER THE FEDERAL SECURITIES ACT AND APPLICABLE STATE SECURITIES ACTS, WITH

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RESPECT TO THIS PROMISSORY NOTE, IS THEN IN EFFECT OR AN EXEMPTION FROM SUCH REGISTRATION REQUIREMENTS IS THEN IN FACT APPLICABLE TO SUCH PROMISSORY NOTE.

1.

Payment of principal and interest due and payable hereunder shall be made in lawful money of the United States of America at the principal office of the corporation.

2.

This Note is one of an authorized issue of six (6%) per cent notes of the Corporation due March 31, 1975 (hereinafter referred to as the "Notes") of the aggregate principal amount of \$1,250,000 Dollars, all of like tenor (except as to denomination) all of which Notes are entitled to the benefits and subject to the terms hereof, duly authorized by resolution of the Board of Directors of the Corporation adopted April 24, 1974. All of these Notes are and shall for all and any purposes be treated as Notes of the same series.

3.

Redemption.

(a) The Notes shall be redeemable at the option of the Corporation in whole or in part at any time or from time to time, at par plus accrued interest to the redemption date.

(b) Notice of any redemption shall be given by mail, not less than ten (10) days nor more than thirty (30) days, prior to the date fixed for the redemption, to the named payees of the Notes at their addresses as appearing in the records of the Corporation, or in the event that any of these Notes have been assigned or otherwise transferred and if the Corporation has been notified of the name and address of such transferee, notice hereunder shall be given by mail to such transferee.

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(c) In case of the redemption of part only of a Note, the notice provided for herein shall specify the portion of the face amount being redeemed; and upon payment of the portion redeemed, the Note shall be cancelled and a new Note, of like tenor, issued for the unredeemed balance, all at the expense of the Corporation.

(d) If this Note or part thereof shall be called for redemption and notice of redemption shall be given as aforesaid, interest shall cease to accrue from and after the redemption date on this Note or the part hereof so called for redemption (unless default shall be made in the payment of the redemption price upon presentation and surrender hereof).

4.

All of the Notes constituting this series shall rank pari passu without preference or priority of any kind over one another, and all and any payments on account of principal or interest (whether redemptions, prepayment, purchase by the Corporation or any other type of payments) shall be applied ratably and proportionally on all outstanding Notes of this series on the basis of the principal amount of indebtedness represented thereby.

5.

Voluntary or Involuntary Breach of the Corporate Obligation.

The following shall constitute acts of Default under this Note:

(a) If default shall be made in the payment of the principal and interest of any of these Notes when and as the same shall become due and payable, or in the observance of any other covenant herein contained;

(b) Upon appointment of a receiver, conservator, or liquidator of or for the Corporation, or of or for a substantial part of the property of the Corporation, whether voluntary or involuntary;

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(c) Upon the making of an application for any aforesaid appointment, or upon the suspension or discontinuance of the business of the Corporation or the making of an assignment for the benefit of creditors or composition with creditors;

(d) Upon the adjudication of the Corporation as insolvent, or upon the filing of a voluntary or involuntary petition in bankruptcy, or for a bankruptcy composition or extension, or the approval of any other petition pursuant to the provisions of the Bankruptcy Act of the United States of America, as last amended, by or against the Corporation;

(e) Upon any part of the business or property of the Corporation being taken possession of, or closed, by any authorized governmental agent or body, or by any procedure authorized by law; or

(f) Upon the Corporation becoming the subject of liquidation or dissolution proceedings.

6.

The Corporation may deem and treat the person in whose name any Note shall be registered in the records of the Corporation as the absolute owner of such Note for the purpose of receipt and payment of principal or interest on such Note and for all other purposes, provided, however, that upon receipt of written notice from a registered holder of any of these Notes stating that he has transferred his Note and stating the name and address of his transferee, the Corporation shall register such transferee as holder of the Note, and, further, upon request by any transferee of any of these Notes, the Corporation shall cancel the transferred Note upon its surrender to the Corporation and immediately thereafter reissue to the surrendering transferee a Note of like tenor showing said transferee as payee, all at the expense of the Corporation.

7.

The Corporation covenants and agrees that no dividend of any kind or character (except stock dividends) will be

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declared or paid on any share or shares of stock of the Corporation until such time as all of these Notes are paid in full or the Holders of a majority in amount of these Notes have consented to such dividends in waiting.

8.

In the event that any of the Holders employ an Attorney-at-law to collect any amounts past due under the terms of these Notes, the Corporation hereby covenants to pay to said Note holder(s) in addition to all other amounts payable hereunder, the actual expenditures, including reasonable attorneys' fees not to exceed 15% of the unpaid balance, to secure or collect any amounts due hereunder.

9.

None of the Note holders shall be deemed to have waived any of their rights or remedies hereunder unless such waiver is made in writing duly signed by the particular Note holder or his duly authorized agent.

10.

The terms and conditions of this Note shall be binding upon and enure to the benefit of the Corporation and its successors and assigns, and the Note holders and their respective heirs, personal representatives and assigns.

11.

Nothing herein shall impair the obligation of the Corporation, which is absolute and unconditional to pay the principal and interest on these Notes in accordance with their terms.

12.

The Corporation and the Note Holders may at any time hereafter modify this Note by a further written instrument, signed by Holders owning 66 2/3% of the outstanding

Exhibit G Annexed to Affidavit of Bertram M. Kantor

amount of these Notes. These Notes shall not, however, be deemed modified in any particular by any act of the Corporation or of any of the Note holders except by such agreement in writing signed by said Note holders.

13.

These Notes are unsecured except that Jerome Zimmerman and Security Management Co., Inc., the present sole shareholders of the Corporation, have deposited their shares in Escrow as security for the payment of these Notes pursuant to an Escrow Agreement dated as of the 24th day of April, 1974.

14.

If any provision or any part of any provision of this Note or if the application of any provision or of any part of any provision to any situation shall be determined by any Court having proper jurisdiction to be invalid, illegal or unenforceable, the remainder of this Note and the application of such provision or such part of a provision to other situations shall not be affected thereby, but shall continue in full force and effect as though such invalid, illegal or unenforceable provision or part of a provision or applications thereof were not originally a part hereof. The Corporation waives presentment, demand, protest and notice of demand, protest and nonpayment except Holder shall take no action for any default hereunder until ten (10) days after receipt by the Corporation of written notice of any such default and failure to cure same by the Corporation within said ten (10) day period.

IN WITNESS WHEREOF, D-Z INVESTMENT COMPANY has caused this Note to be signed by its President, and its corporate seal to be affixed hereto and attested by its

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Secretary, and this Note to be dated as of the _____
day of _____, 1974.

D-2 INVESTMENT COMPANY

BY: _____
PRESIDENT

CORPORATE SEAL

ATTEST:

BY: _____
Secretary

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EXHIBIT 3

CERTIFICATE AND PURCHASE ORDER

_____, 1974

D-Z Investment Company
420 14th Street N.W.
Atlanta, Georgia 30318

I desire to purchase \$_____ of D-Z Investment Company's Promissory Notes due March 31, 1975, (the "Notes"), in the principal amount of \$_____ and I am enclosing my check herewith payable to D-Z Investment Company in said amount for such purchase.

1. I have read D-Z Investment Company's Private Placement Memorandum for Issuance of Up To \$1,250,000 of 6% Promissory Notes Due March 31, 1975, said Memorandum dated April 24, 1974.

2. It is understood that all documents, agreements, records, and books pertaining to D-Z Investment Company (the "Company") and the issuance of said Notes other than information relating to the specific real estate investment trust ("REIT") whose stock the Company has purchased, is purchasing, or will be purchasing have been made available to me, my attorney and/or my accountant,

and that I have had an opportunity to review all aspects of this

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investment except as herein stated and I understand the reasons the Company does not desire to disclose information to me at this time about the particular BILT whose stock it is purchasing.

3. I understand that until the Company has received Purchase Orders for the issuance of at least \$500,000 in the aggregate of such Notes, other than the \$100,000 of such Notes to be purchased by Security Management Co., Inc. ("Security") and Jerome Zimmerman ("Zimmerman"), the funds paid herewith will be held in a separate escrow account and not used for the purposes of the Company as set forth in the Private Placement Memorandum described above.

4. I understand that my right to transfer the Note issued to me will be restricted as set forth in the Note, a copy of the form of said Note having been heretofore delivered to me, and as further restricted under and by virtue of the Securities Act of 1933, as amended, and any State Securities law applicable thereto.

5. I understand that I am purchasing the Note from the Company without being furnished any offering literature or prospectus other than the Private Placement Memorandum described above and that this transaction has not been submitted to or reviewed by any regulatory authority because of the representation by the Com-

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pany of the limited number of persons to whom the Notes will be sold, the private aspects of the offering, and the exemption from registration of such securities under the Georgia Securities Act because of the availability of exemption from registration pursuant to Section 8(j) of said Act.

6. This Note is being purchased for investment from my own account and not for the interest of any other person and not for resale to others.

7. I further warrant that my personal net worth is in excess of double the amount of the Note to be issued to me and in any event is not less than \$150,000.

8. I have taken full cognizance of and understand all the risk factors described in the Private Placement Memorandum described above related to the business activities of the Company and the use of proceeds of the Notes and the manner in which said Notes may be repaid. I have had significant business and investment experience by virtue of which I am capable of evaluating the hazards and merits of purchasing the Note for which I have delivered my check contemporaneously herewith.

9. In making this investment I have relied only upon such advice as I may have received from personal investment, tax and legal advisors. No assurances or representations have

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been made to me by the Company, its officers, directors, or any of its advisors, including without limitation, as to the success of the business of the Company, or to what tax consequences may result from my investment under the present Internal Revenue Code or the Regulations promulgated thereunder, although I acknowledge having made inquiry of one or more officers of the Company and its advisors to the extent I deemed necessary to evaluate the hazards and merits of purchasing the Note for which I have enclosed my check.

10. I understand that the Notes are being offered and sold without registration under the Securities Act of 1933, as amended, in reliance upon the exemption from registration requirements for nonpublic offerings. I acknowledge and understand that the availability of said exemption depends in part upon the accuracy of certain of the representations, declarations and warranties which I am required to make and which I have made in this Certificate and Purchase Order with the intent that the same may be relied upon in determining my suitability as a purchaser of one of the Company's Notes.

11. I understand that the Notes are being offered and sold without registration under the Georgia Securities Act of 1973,

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as amended, in reliance upon the exemption from registration pursuant to Section 3(j) of said Act which exempts from registration negotiable instruments maturing in not more than twelve months from issue and sold without the same being offered for sale by means of advertisements publicly disseminated in the news media or through the mails. I acknowledge that I am unaware of any advertisement with respect to the sale of said Notes by the Company and I also represent and state that I have not been solicited through the mails by the Company or anyone acting on its behalf for the purchase of a Note from the Company.

12. I agree and understand:

(a) The Note will be acquired by the undersigned solely for investment and not with a view to or for resale in connection with, any "distribution" within the meaning of the Securities Act of 1933, as amended; the Note will not be purchased for subdivision or fractionalization; the undersigned has no contract, undertaking, agreement, or arrangement with any person to sell, transfer, or pledge to such person, or anyone else the Note or any part thereof and the undersigned has no present plans to enter into any such contract, undertaking, agreement, or arrangement.

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(b) I will not attempt to dispose of the Note acquired by me unless and until the Company has determined to its satisfaction that the proposed disposition does not violate the registration requirement of the Securities Act of 1933, as amended, or any applicable State securities law. I understand that the Company may require an opinion of counsel satisfactory in form and substance to the foregoing effect as well as to counsel itself, before permitting a transfer.

(c) The Company has no obligation or intention to register the Notes in order to permit sales thereof in accordance with the registration requirements of the Securities Act of 1933, as amended. I further understand that Rule 144 under such Act which permits resales or restricted securities without registration in certain cases and which is the principal means by which such resales are permitted may not be available as to resales of the Note because there may not be compliance with at least one of the conditions to its availability, the requirement that certain public information of the issuer (the Company) of the securities be available. I acknowledge that the staff of the Securities and Exchange Commission has expressed an opinion to the effect that persons who propose to sell restricted securities other than pursuant to Rule 144 will have a substantial burden of proof in establishing that an exemption from registra-

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tion is available and that persons who participate in such sales do so at their own risk.

(8) I recognize in the light of the foregoing there will be no public market for the Notes and it may not be possible for me to liquidate my investment readily or at all.

13. I hereby agree to indemnify the Company and to hold it, its directors and officers harmless of liability, cost, or expenses (including reasonable attorney's fees) arising as a result of the sale or distribution of the Note or any part thereof by me in violation of the Securities Act of 1933, as amended, or any other applicable law.

14. I have reviewed the form of the Note to be issued to me and agree that the legend reading as follows shall appear on said note:

"This Promissory Note is a security within the meaning of the Federal and Georgia Securities law.

It has not been registered under the Federal Securities Act or the Securities Act of any State.

This Promissory Note is being acquired by the holder for investment purposes only and not for resale. No such Note may be sold, offered for sale, assigned, or transferred unless a registration statement under the Federal Securities Act and applicable State

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Securities Acts, with respect to this Promissory Note,
is then in effect or an exemption from such registration
requirements is then in fact applicable to such Prom-
issory Note."

(Signature of Note Purchaser)

Print Name

Print Mailing Address

Social Security Number

WITNESS:

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EXHIBIT H--SUMMARY LIST OF NJB STOCKHOLDERS ANNEXED
TO AFFIDAVIT OF BERTRAM M. KANTORW.J.E. Trust Investors
Shareholders as of May 1, 1974
Holders of 1,000 to 10,000 Shares

Order #	Customer Name & Address	# of Shares
1	Allen & Company 15th & New York Avenue Washington D.C. 20005	6,400
2	Atru & Company P.O. Box 2210 Waterbury Ct. 06720	2,180
3	Atwell & Company Box 456 Wall Street New York, New York 10005	1,100
5	Bache & Co. 100 Gold Street New York, New York 10038	3,329
6	Baldwin & Co. Box 511 Montgomery, Al. 36101	5,000
7	Barnett & Co. Box 704 Church Street New York, New York 10008	2,380
8	Bauer & Co. Box 15005 New York, New York 10049	1,000
10	Beck & Co. 744 Broad Place Newark, New Jersey 07102	2,048
13	CBWL Hayden Stone Inc 17 Battery Park Plaza New York, New York 10004	3,390
16	Calhoun & Co. Box 1319 Detroit, Mi. 48321	5,500
34	Firnat & Co. Box 2669 Phoenix, Arz. 85002	1,000
36	First Regional Sec. Inc. 7 East Redwood Street Baltimore, Md. 21205	1,047
39	Friendly Company 60 Hempstead Avenue West Hempstead, New York 11552	2,500
51	Kane & Company 1 Chase Manhattan Plaza New York, New York 10015	2,000
55	Meba & Co. 27 N State Street Concord, N.H. 03301	9,761
57	Merrill Lynch 1 Liberty Plaza New York, New York 10006	3,232
58	Mil-late Co. Box 22212 Milwaukee, Wis. 53222	2,200

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Exhibit H Annexed to Affidavit of Bertram M. Kantor

<u>Customer #</u>	<u>Customer Name & Address</u>	<u># of Shares</u>
60	Jas H. Oliphant & Co., Inc. 61 Broadway New York, New York 10006	3,000
61	J Coir & Comp. Box 1268 Church st. New York New York 10008	1,739
63	Paco 411 S Main Street Los Angeles Ca, 90013	3,416
68	Pershing & Co Inc. 120 Broadway New York, New York 10005	1,706
72	Shearson, Hammil & Co. 14 Wall Street New York, New York 10005	1,538
88	H.A. Whitten & Co. Box 1368 Church Street New York, New York 10008	1,000
90	Zereb Box 3168 Portland, Or. 97208	1,000
91	A.R. Investment 345 Underhill Blvd Soyosett, New York 11791	1,400
95	E. Farington Abbott Jr. 81 Main Street Auburn, Me. 04210	1,139
112	Goodwin Adrian 129 Market Street Paterson, New Jersey 07505	1,200
185	Bacal Trust Dept Box 3121 Portland, Or. 97208	3,000
219	Alfred S. Barnett 153 Ocean Avenue Daytona Beach, Fl. 32018	1,000
276	Benjamin L. Bendit 744 Broad Street Newark, New Jersey 07102	1,000
289	Bergen Rockland Retirement 180 Old Hook Road Westwood, New Jersey 07675	1,000
308	Sydney Berman C/O Berm Studios Inc. 404 Industrial Park Dr. Yeadon, Pa. 19050	1,000
330	Austin D. Bevier 12382 Janet Circle Garden Grove, Ca 92641	1,000
360	Richard J. Brooston 2855 Palm Avenue Pompano Beach, Fl. 33060	1,520
365	Samuel Bluestein 384 Lex Avenue Clifton, N.J. 07011	1,500

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Exhibit H Annexed to Affidavit of Bertram M. Kantor

<u>Customer #</u>	<u>Customer Name & Address</u>	<u># of Shares</u>
583	Edward H. Borneman 87 Great Hills Rd. Short Hills, N.Y. 07078	1,876
121	Bruver & Co. P.O. Box 1426 New York, N.Y. 10008	5,000
559	Harriett S. Chase 33 Camelot Rd. Yarmouth Port, Ma. 02677	1,000
558	Donald C. Chase 33 Camelot Rd. Yarmouth Port, Ma. 02677	1,100
628	Catherine K. Collins 13689 No 108 St. Sun City 85351	1,400
644	Robert Alan Daniels 927 Sciolo Dr Franklin Lakes 07417	1,000
746	George W. Deyo Baxter Lane Milford Ct. 06460	1 00
747	Mary A. Deyo Baxter Lane Milford, Ct. 06460	1,400
787	Harry Drockner 80 Deborah Dr. Newton Center, Ma. 02159	8,785
790	Sophie Drooker 39 West St. Randolph, Ma. 02368	1,500
809	Hyman Dushman 43 Nancy Lane Brockton, Ma. 02403	1,200
813	JNB Comp. P.O. Box 90 Jacksonville, Fl. 32201	2,200
848	Ena Ellis 35 South Rd. Bloomington, N.J. 07403	1,550
855	Morton Engel 6405 Leonardo St. Coral Gables, Fl. 33134	1,000
931	Carl H. Ficke & Savilla 20 Upper Cross Rd. Saddle River, N.J. 07662	1,119
980	Jacob S. Freedman 3100 Palm Ave. Pompano Beach, Fl. 33060	1,000
995	Constance R. Friedman 2424 NE 26 Court Ft. Lauderdale, Fl. 33306	1,250
1032	Frederic H. Gasbell Jr. 1 Bway. New York, N.Y. 10004	1,000

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Exhibit H Annexed to Affidavit of Bertram M. Kantor

<u>Exhibitor #</u>	<u>Exhibitor Name & Address</u>	<u># of Shares</u>
1037	Robert Gault Morris Ave. Suffolk, N.Y. 07901	1,032
1079	Samuel Ginsberg RR 110502 Wyncote, Pa. 19075	1,000
1078	Sidney L. Gimbel One E. LaSalle St. Chicago, Ill. 60602	1,000
1103	Cynthia Goldman 1 Highland Glen Dr. Randolph, Mo. 62368	2,000
1126	Goud Investors Trust 245 Great Neck, N.Y. 07505	1,000
1140	Greater Jersey Mortgage 657 Main Ave. Passaic, N.J. 07055	1,000
1208	Carl V. Hansen & Elfrieda Hansen 49 Auburn Rd. Hartford, Ct. 06119	1,000
1213	Russel Harman 3028 Tyrone Lane Sarasota, FL. 33580	1,000
1271	Bruno Herman & Esther 24 West Parkway Clifton, N.J. 07015	1,500
1332	Hazel A. Holland Shoreland Dr. Madison, Ct. 06443	1,000
1358	William Hummel C/O Trust Dept. First New Haven National Bank	1,400
1374	JNB Comp. National Bank P.O. Box 90 Jacksonville, Fl. 32201	5,300
1413	Johanson Mfg. Co. Box 329 Boonton, N.J. 07005	4,880
1417	Herman T. Johnson 45 Long Wood Ave. Brookline, Ma. 02146	1,400
1494	Joe Kendall 90 Corona NBR Denver, Co. 80218	1,000
1539	Aaron Koenig 557 Central Ave. Cedarhurst, N.Y. 11516	3,523
1551	Phillip C. Kopitsky 10359 Corbel Lane St. Louis, Mo. 63141	1,000
1139	Greater Jersey Bancorp 125 Market St. Patterson, N.J. 07055	5,160

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Exhibit H Annexed to Affidavit of Bertram M. Kantor

2578	Phillip E. Solomon 340 Fifth Ave. Room 5622 New York, N.Y. 10005	3,000
2596	Jack. Srochomik 99 Frederick St. New Haven, Ct. 06515	1,100
2605	E. Milton Staub 200 Canterbury Rd. Westfield, N.J. 07090	1,220
2642	Leon S. Stone & Ruth H. Stone JT Ten 100 Bedford Ave. Hamden, Ct. 06517	2,050
2730	David W. Traub 20 Crumite Rd. Londonville, N.Y. 12211	1,976
2785	Helen P. Vermilyea 100 Springlake Run Silver Springs Shores Ocala., Fl. 32670	1,000
2799	Gladys H. Vonhacht 122 Knobb Hill Road Milford, Ct. 06460	2,050
2837	Barbara E. Waters P.O. Box 295 Forked River, N.J. 08731	1,480
2840	MC Wear 1400 N. Woodlawn, Wichita, Ks. 67208	1,250
2855	Jack & Ruth Weisbord JT Ten 2751 Palm Aire Drive Pompano Beach, Fl. 33060	1,292
2891	Dorothea B. White 72 Hilltop Terr. Redbank, N.J. 07701	1,488
2892	George C. White 72 Hilltop Terr. Redbank, N.J. 07701	2,388
2894	Stephen A. White C/O White Furn. Co. Mebane, N.C. 27302	2,300
2895	Summer T. White 23 Union Ave. Milton, Ma. 02187	1,300
2900	Harry G. Wilbers Jr. 26 Janet Dr. New Haven, Ct. 06473	2,100
2930	Marsha N. Winkler & Barbara Jean Winkler J/T South St., Rockport, Ma. 01966	1,106
3044	Edward Waitzer 420 Glenairan Ave. Toronto, Canada	1,000

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Exhibit H Annexed to Affidavit of Bertram M. Kantor

Customer #	Customer Name & Address	# of Shares
2049	Joseph Desmar C/O Auto City P.O. Box 18 East Boston, Ma. 02128	1,100
2167	Harold Porter Jr. 470 Clifton Ave. Clifton, N.J. 07010	3,000
2170	Henry Posthumus & Eleanor A-1 Ranch, Union Valley Road Newfoundland, N.J. 07435	1,000
2181	Prime Equities Inc. Attn.: Peter Simon 1030 Clifton Ave. Clifton, New Jersey 07013	5,000
2230	Kurt P. Reimann 1880 So. Ocean Blvd. Lantana, Fl. 33460	1,000
2234	Orene L. Remonko & Pierina 558 Paramus Rd. Paramus, N.J. 07652	1,000
2249	Robert Rietheimer P.O. Box 3547 Ft. Lauderdale, Fl. 33316	1,000
2315	Adele Rothchild 900 N. Lake Shore Dr. Chicago, Ill. 60611	1,250
2335	Phillip T. Ruegger Jr. 23 Rayle Court Metuchen, N.J. 08840	1,220
2408	Albert R. Schneider 137 Rivera Dr. East Lindenhurst, N.Y. 11757	1,100
2417	Peter Schotanus 16-37 Pamela Ave. Fair Lawn, N.J. 07410	1,000
2430	Charles Schwartz 90 Greenwood St. Newton Ctr., Ma. 02159	1,000
2463	Barnet Shapiro 22 Grasmere Road Needham, Ma. 02194	1,425
2466	Hyman Shapiro 5 Wadsworth Terrace Cranford, N.J. 07016	3,200
2467	Mildred Shapiro 5 Wadsworth Terrace Cranford, N.J. 07016	1,200
2492	Marcel May Sherwood 8 Dater Lane Saddle River, N.J. 07458	1,000
2518	Bessie Silverman 46 Birchwood Road Randolph, Ma. 02368	1,000
2529	Mildred K. Simon 33 Macoline Rd. Clifton, N.J. 07012	1,000

Exhibit H Annexed to Affidavit of Bertram M. Kantor

<u>Customer #</u>	<u>Customer Name & Address</u>	<u># of Shaves</u>
1540	Emil Kucin 20-10 West Drive Harbor Isle, Miami Beach, Fl. 33441	1,232
1564	Alick Levine 167 Mineral Springs Ave. Passaic, N.J. 07055	1,464
1670	Helen Levine 100 E. 38 St. Patterson, N.J.	1,050
1708	France Litinsky & Rose 87 Risley Rd. Chestnut Hill, Na. 02167	4,130
1709	Eleanor Little Clapboard Hill Rd. Guilford, Ct. 06437	1,100
1740	Gene E Lumpkin P.O. Box 494 Cameron, Tx. 76520	1,000
1765	Allan A Maki 152 Deer Trail No. Ramsey, N.J. 07446	1,800
1789	Market Main & Co. P.O. Box 1311 Warren, Oh. 44482	2,875
1813	Albert A Mason 1009 N. Beverly Dr. Beverly Hills, Calif. 90210	1,952
1826	Rives Mathews P.O. Box 2921 Phoenix, Az. 85036	1,000
1948	Jorge Garcia Montes 446 Gerona Ave. Coral Gables, Fl. 33146	1,317
1840	Martin E. McCarthy Jr. RR 7 Box 531 Fairmont, W.V. 26554	1,000
1871	Helen Gower Means 265 Kings Highway No. Haven, Ct. 06473	1,400
1872	K. Glenn Means 265 Kings Highway No. Haven Ct. 06573	1,400
1954	Henry Morris & Pearl A. 321 Elm Ave. No. Hill, Pa. 19038	1,000
1961	Marvin Mosberg 303 Gramercy Place Glenrock, N.J. 07452	1,000
2036	Northwestern Construction Co. 195 Main St. Metuchen, N.J. 08340	3,660
2042	Lawrence J. O'Brien 657 Main Ave. Passaic, N.J. 07055	1,600

EXHIBIT I--SUMMARY LIST OF NJB STOCKHOLDERS ANNEXED
TO AFFIDAVIT OF BERTRAM M. KANTOR

F

N.J.B. Prime Investors
Shareholders as at May 10, 1974
Holders of More Than 10,000 Shares

Customer #	Customer Name & Address	# of Shares
17	Cede & Co. Box 20 Bowling Green Street New York, New York 10004	274,926
20	Comtru & Co. Grand at 12th Street Kansas City, Mo. 64106	12,110
23	Cudd & Co. Box 1508 Church Street New York, New York 10008	24,947
31	C A England & Comp. Box 1368 Church Street New York, New York 10008	10,012
47	Houvis & Comp. 326 Union Street Nashville, Tn. 37219	19,436
50	Jay & Company Box 1102 Beverly Hills, California 90213	61,000
81	Tranco & Co. Box 693 Kansas City, Mo. 64141	41,219
121	Alico Management Co. P. O. Box 1849 Waco, Texas 76703	10,000
40	Gerlach & Co. 20 Exchange Place New York, New York 10015	92,500

546,150

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AFFIDAVIT OF ALLEN MAKI IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

D-Z INVESTMENT COMPANY,	:	
	:	
Plaintiff,	:	74 Civ. 2379 (I.B.W.)
	:	
-against-	:	
	:	<u>AFFIDAVIT</u>
ROBERT E. HOLLOWAY, MELVIN S. TAUB,	:	
MAURICE J. BRICK, PETER E. SIMON,	:	
NORMAN BRASSLER, CHARLES GILLER,	:	
HERBERT E. HARPER, DR. GORDON McKINLEY,	:	
JAMES R. MOSELEY, III, JACK G. TAYLOR,	:	
DALLAS S. TOWNSEND, JR. and NJB PRIME	:	
INVESTORS,	:	
	:	
Defendants,	:	
	:	
-and-	:	
	:	
SECURITY MANAGEMENT CO., INC., CANTOR,	:	
FITZGERALD & CO., INC., BRUCE R. DAVIS,	:	
JEROME ZIMMERMAN, RALPH M. BECKER, SAUL	:	
BECKER, BERNARD KROLL, MAX SOPHIER, HAROLD	:	
LEVOW, HAROLD B. LEVIN, HARVEY JACOBSON,	:	
SEYMOUR WEINBERG and RONALD D. FEINMAN,	:	
	:	
Additional Defendants	:	
to Counterclaims.	:	

-----x

ALLEN MAKI, being duly sworn, deposes and says:

1. I reside at 152 Deer Trail North, Ramsey, New Jersey.
My office is at 1 Garret Mountain Plaza, West Patterson, New Jersey.

2. I own 2,000 shares of beneficial interest in NJB Prime Investors Inc. ("NJB") which are listed of record in my own name at my residence address. In addition, 1,000 shares of NJB are listed in the name of my law firm at its former address at

Affidavit of Allen Maki

15 Broadway, Passaic, New Jersey; 100 shares of NJB are also registered in my name as custodian under the New Jersey Uniform Gifts to Minors Act.

3. On a Monday, in the third or fourth week of June 1974 I received a telephone call from a man identifying himself as a Mr. Schwartz who asked me if I was interested in joining a group to call a special shareholder's meeting of NJB to elect new trustees. The caller advised me that he represented "a proxy group" that had over 100,000 shares including the single largest shareholder of NJB. He further stated that I had a substantial block of NJB stock and that he was contacting people who had substantial blocks.

4. I advised the caller that I was not interested. The caller then proceeded to ask me if I was satisfied with the present management of NJB and thereafter set forth his view that the performance of the NJB management was woefully inadequate and that there should be a change in the trustees of NJB.

5. At no time during our telephone conversation did the caller identify by name who he represented nor did he identify his business affiliation. At the time I received the call I had never met nor was I acquainted with the caller.

Sworn to before me this
18th day of July, 1974.

Allen Maki
Allen Maki

Ethel M. Shelton
Notary Public

AFFIDAVIT OF HERBERT M. WACHTELL IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

D-Z INVESTMENT COMPANY, :

Plaintiff, : 74 Civ. 2379 (I.B.W.)

-against- :

ROBERT E. HOLLOWAY, MELVIN S. TAUB, : AFFIDAVIT
MAURICE J. BRICK, PETER E. SIMON, :
NORMAN BRASSLER, CHARLES GILLER, :
HERBERT E. HARPER, DR. GORDON MCKINLEY, :
JAMES R. MOSELEY, III, JACK G. TAYLOR, :
DALLAS S. TOWNSEND, JR. and NJB PRIME :
INVESTORS, :

Defendants, .

-and- :

SECURITY MANAGEMENT CO., INC., CANTOR, :
FITZGERALD & CO., INC., BRUCE R. DAVIS, :
JEROME ZIMMERMAN, RALPH M. BECKER, SAUL :
BECKER, BERNARD KROLL, MAX SOPHIER, HAROLD :
LEVOW, HAROLD B. LEVIN, HARVEY JACOBSON, :
SEYMOUR WEINBERG and RONALD D. FEINMAN, :

Additional Defendants
to Counterclaims. :

-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HERBERT M. WACHTELL, being duly sworn, deposes and says that he is a member of the firm of Wachtell, Lipton, Rosen & Katz, attorneys for the individual defendants in this action who are the trustees of NJB Prime Investors, Inc. ("NJB").

1. I am submitting this affidavit in order to relate the substance of two recent phone conversations I have had with

Affidavit of Herbert M. Wachtell

Mr. George White and Mr. Harry G. Wiberg, Jr., both of whom are the owners of shares of beneficial interest of NJB. I spoke with Mr. White on July 8, 1974 and with Mr. Wiberg on July 18, 1974, having first learned of Mr. Wiberg's identity on that date. Due to the press of time necessitated by the present motion, we have been unable to obtain Mr. Wiberg's affidavit. Mr. White is presently in Canada and is thus unable to submit his own affidavit.

2. Mr. White, who resides at 72 Hilltop Terrace, Red Bank, New Jersey, is the owner of 2,388 shares of beneficial interest of NJB which are listed of record in his name at his residence address. Mr. White advised me that in late June 1974 he had received a telephone call at his home from someone identifying himself as a Mr. Schwartz, who stated to Mr. White that he was seeking to round up NJB shareholders for purposes of calling a special shareholders' meeting and asked if Mr. White would join in. According to Mr. White, the caller stated that he had phoned "several others" who owned shares in NJB.

3. Mr. White further advised that he had requested additional information from the caller, but that none was forthcoming. Notwithstanding Mr. White's request, the caller did not identify his business affiliation nor did he tell Mr. White whom he represented.

4. Mr. Wiberg, who resides at 26 Janet Drive, North Haven, Connecticut, is the owner of 2,100 shares of beneficial

Affidavit of Herbert M. Wachtell

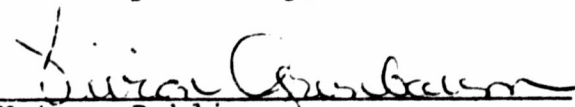
interest of NJB which are listed of record in his name at his residence address.* During our conversation Mr. Wiberg informed me that in late June 1974 he had received a telephone call at his home from a person whose name he does not recall. As related to me by Mr. Wiberg, the caller stated that he represented a group of NJB shareholders who were soliciting support; that they wanted "to do something different than management" or wanted "to change things" at NJB. Mr. Wiberg told me that the caller had made it clear that he was from a group opposed to the management of NJB and that he was seeking to enlist Mr. Wiberg's support. Mr. Wiberg did not recall whether or not the caller had mentioned any business affiliation.

5. Mr. Wiberg further advised me that as soon as the purpose of the phone call became clear, he (Mr. Wiberg) informed the caller that he had attended the NJB annual meeting and was satisfied with what he had seen. Mr. Wiberg stated that the caller did not press the matter further and that the conversation terminated at that point.


Herbert M. Wachtell

Sworn to before me this

19th day of July, 1974


Notary Public

* Mr. Wiberg advised me during our phone conversation that he actually owns 2,200 shares of record, but that 100 shares are erroneously shown as being owned by "Wilberg".

SUPPLEMENTAL AFFIDAVIT OF BERTRAM M. KANTOR
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D-Z INVESTMENT COMPANY,

Plaintiff,

-against-

ROBERT E. HOLLOWAY, MELVIN S. TAUB,
MAURICE J. BRICK, PETER E. SIMON,
NORMAN BRASSLER, CHARLES GILLER,
HERBERT E. HARPER, DR. GORDON MCKINLEY,
JAMES R. MOSELEY, III, JACK G. TAYLOR,
DALLAS S. TOWNSEND, JR. and NJB PRIME
INVESTORS,

Defendants,

-and-

SECURITY MANAGEMENT CO., INC., CANTOR,
FITZGERALD & CO., INC., BRUCE R. DAVIS,
JEROME ZIMMERMAN, RALPH M. BECKER, SAUL
BECKER, BERNARD KROLL, MAX SOPHIER,
HAROLD LEVOW, HAROLD B. LEVIN, HARVEY
JACOBSON, SEYMOUR WEINBERG and RONALD
D. FEINMAN,

Additional Defendants
to Counterclaims.

74 Civ. 2379
(I.B.W.)

SUPPLEMENTAL
AFFIDAVIT

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

BERTRAM M. KANTOR, being duly sworn, deposes and says
that he is a member of the firm of Wachtell, Lipton, Rosen & Katz,
attorneys for the individual Trustees of NJB Prime Investors
("NJB"), a real estate investment trust (or "REIT") which is the

target of a takeover attempt by the plaintiff herein. The Trustees are named as defendants herein, and have also asserted counter-claims against plaintiff and certain additional defendants, alleging violations of the Federal securities laws in the takeover attempt.

1. This affidavit is submitted in further support of the motion filed by the Trustees on July 19, 1974, for a preliminary injunction against plaintiff and those acting in concert with plaintiff, restraining them from purchasing or in any way arranging to purchase shares of NJB, or in any manner soliciting the call of a shareholders meeting or participating in any such meeting as might be called, pending the trial and determination of the Trustees' counterclaims herein. At a hearing held to set the return date for the instant motion, before the Honorable Kevin T. Duffy, counsel for plaintiff stipulated on the record that plaintiff would make no such purchases or solicitations pending the return date of this motion.

2. The Trustees' motion seeks to bring to a halt a course of conduct which is a virtual catalogue of violations of the Federal securities laws, notably those provisions applicable to takeover attempts such as plaintiff's. As is more fully set forth in my affidavit of July 19, 1974, previously submitted in support of the motion (the "Kantor Affidavit"), a pervasive pattern of continuing violations of law by plaintiff in connection with

Supplemental Affidavit of Bertram M. Kantor

its takeover attempt was unearthed in the initial stages of discovery had herein on behalf of the Trustees -- discovery which, it might further be noted, plaintiff and its confederates had tried to prevent through no fewer than four applications to this and other courts (see Kantor Affidavit ¶ 4).

3. Discovery had by the Trustees since my affidavit of July 19, 1974 has resulted in numerous important additional disclosures which cast new light on the unlawful scheme which plaintiff has formulated to gain control of NJB, and the illegal means which plaintiff and its confederates have employed in their efforts to bring that scheme to fruition. This supplemental affidavit sets forth these disclosures to the extent they could not be described in the Kantor Affidavit and accompanying papers, either because the information came to light only in discovery conducted after July 19,* or because further analysis of prior

* Such further discovery has included: the deposition of Bruce R. Davis, the guiding genius of plaintiff's takeover bid, and in particular a principal author of plaintiff's various borrowing schemes (see Kantor Affidavit ¶¶ 6-36, 37-39); the depositions of many of the individuals who bought plaintiff's 6 per cent notes in a purported "private placement" (see Kantor Affidavit ¶¶ 13, 26-32); and the depositions of two representatives of Cantor, Fitzgerald & Co., Inc. ("Cantor, Fitzgerald"), the broker and investment advisor which has throughout the takeover bid provided plaintiff with numerous entrees to the financial community in order to procure the necessary funds. (See Kantor Affidavit ¶¶ 6, 8-18, 33-36, 40-45.) Copies of the transcripts of the aforesaid depositions are being submitted herewith for the Court's convenience.

discovery has disclosed additional highly relevant matter.*
Additionally, it must be noted that such further discovery has corrected erroneous and indeed highly misleading statements about plaintiff's plans and activities made by certain witnesses in the initial discovery had by the Trustees.

4. By virtue of such further discovery, there is now of record herein documentary and testimonial evidence showing, inter alia:

(A) that plaintiff has formulated and is actively pursuing plans -- never disclosed in its Schedule 13D filings -- as to both the financing of its takeover of NJB and the operations of NJB should it acquire control, which undisclosed plans include the use of NJB funds to repay not only the borrowings with which it has financed its prior purchases of NJB shares (see Kantor Affidavit ¶ 24), but new, multi-million dollar credit arrangements currently being negotiated in order to finance D-Z's future purchases of NJB shares (see ¶¶ 5-14, infra);

* In this connection we would note that it was only on the evening of July 18 that plaintiff at last responded in any significant volume to the document demand which your deponent's firm had served on plaintiff's counsel more than two weeks previously on July 3. Given the urgency which necessitated that the motion papers be filed on July 19 (see Kantor Affidavit ¶ 2), there was not sufficient time before the motion papers were filed to analyze the documents finally made available to us. Copies of certain of these documents and others produced in conjunction with the above-mentioned depositions are annexed as exhibits hereto.

Supplemental Affidavit of Bertram M. Kantor

(B) that consummation of the new financing arrangements now in negotiation would entail further violations of the margin regulations by Kantor, Fitzgerald and plaintiff (see §§ 15-19, infra);

(C) that not only have plaintiff's borrowings to date involved an unregistered public offering of 6% notes (see Kantor Affidavit §§ 26-32; §§ 20-24, infra), but much of the money advanced by the noteholders was borrowed by them from banks, in violation of margin Regulations U and X (see §§ 25-27, infra);

(D) that plaintiff's unlawful "creeping" or de facto tender offer (see Kantor Affidavit §§ 37-39) will continue unless plaintiff is restrained therefrom by this Court, since plaintiff and its principals remain fixed in their intent to acquire control of NJB (see §§ 28-31, infra); and

(E) that plaintiff's violations of the proxy regulations (see Kantor Affidavit §§ 40-45) are now established by direct, sworn testimony of the Kantor, Fitzgerald employees who actually committed the violations on plaintiff's behalf, as well as evidence obtained from certain of those persons unlawfully solicited (see §§ 32-36, infra).

Supplemental Affidavit of Bertram M. Kantor

- A. Plaintiff is now actively pursuing major outside financing for its further purchases of NJB shares, and has formulated other specific future plans for NJB if plaintiff gains control, while failing to make the required disclosures thereof.

5. Further discovery has revealed that plaintiff -- through its principal, Bruce R. Davis, and with the active assistance of Kantor, Fitzgerald -- has been and is currently engaged in negotiations to obtain literally millions of dollars in outside funds with which to finance plaintiff's takeover attempt. Not a word of these financing schemes has appeared in plaintiff's Schedule 13D filing and the recent flurry of amendments thereto,* notwithstanding the explicit instruction for

* It is noteworthy that since your deponent's firm has been actively prosecuting this action, plaintiff has seemingly "gotten religion", filing no fewer than three amendments to its Schedule 13D in an eight-day period, at least one of which corrects -- rather belatedly -- a highly material omission from the earlier filings. Thus, Amendment No. 4 dated July 17, 1974, a copy of which is annexed hereto as Exhibit "A", reveals that \$62,500 was borrowed from a bank in order to finance plaintiff's purchases (Exhibit "A", p. 1) -- a transaction which Davis' deposition testimony indicates took place in late May, prior not only to Amendment No. 4, but to the dates of Amendment Nos. 2 and 3 as well. It is further noteworthy that under the pressure of this litigation, plaintiff is beginning to make some attempt to comply with the mandate of Rule 13d-2, promulgated pursuant to Section 13(d) of the Securities Exchange Act of 1934 (the "Exchange Act") that such amendments be filed "promptly". Thus, whereas (1) plaintiff allowed almost three weeks to elapse between the original 13D filing and the filing of Amendment No. 1 -- during which lapse plaintiff purchased 7,300 additional shares; (2) plaintiff waited nearly two weeks further before filing Amendment No. 2 -- while it purchased 29,000 more shares; and (3) waited another month and five days before filing Amendment No. 3 -- while it purchased 51,000 shares more, Amendment No. 4 was filed a scant 8 days after No. 3, and Amendment No. 5 (a copy of which is annexed as Exhibit "B" hereto) followed only two days later. While, as is fully set forth herein, none of these amendments makes remotely adequate disclosures, plaintiff's sudden burst of diligence in submitting them after this litigation began to focus on the inadequacy of the previous filings is evidence that plaintiff attempts even to colorably comply with the applicable legal requirements only when pushed to it.

the preparation of the "Source of Funds" item of Schedule 13D that it must "[s]tate the source and amount of funds or other consideration used or to be used in making the purchases * * * ."

In light of the further facts that plaintiff, if successful, intends to use NJB funds to repay plaintiff's borrowings -- as has been confirmed in further discovery herein -- and that plaintiff has also completely failed to disclose this intention, plaintiff has also totally concealed crucial facts about the "Purpose of [the] Transaction" as required by Section 13(d) of the Exchange Act.*

6. Thus, while it was clear from the first several days of discovery that plaintiff had formulated a specific, carefully calculated plan to finance its attempted takeover of NJB through a complex transaction involving the purported private placement of certain notes of plaintiff -- the highly material terms of which transaction were not disclosed in plaintiff's Schedule 13D (see Kantor Affidavit ¶¶ 12-13, 26-32) -- it is now apparent that the note scheme was only the tip of the proverbial iceberg. Specifically, discovery has now made it apparent that the "private placement" was only one of at least six plans which plaintiff and/or Kantor, Fitzgerald have concocted in an effort to obtain financing

* While the discussion in the text hereof concerning plaintiff's inadequate 13D filings concentrates on their failures to disclose its "Source of Funds" and the "Purpose of [the] Transaction", plaintiff's 13Ds are also false and misleading in numerous other respects, including the thoroughly inaccurate information about whether plaintiff's trades were made on the American Stock Exchange, or over-the-counter (see Davis Tr., pp. 330-31).

for plaintiff's attempted takeover of NJB, and further that all six plans were variations on an underlying, unvarying scheme -- that plaintiff would finance its takeover in two stages; the first to consist of massive borrowings by plaintiff (or the sale of alleged "equity" participations in plaintiff, a shell corporation, see p. 13, fn., infra); the second to consist of the use of NJB assets to repay plaintiff's lenders or to reward plaintiff's equity investors.

7. It has become possible to set these facts before the Court only in this supplemental affidavit because they are nowhere set forth -- or so much as hinted at -- in plaintiff's 13D filings, notwithstanding that the underlying scheme has existed since at least mid-April 1974, three weeks before plaintiff's first such filing. The existence of this scheme and the history of plaintiff's attempts to implement it were also not previously available because Lawrence F. Orbe, vice-president of Cantor, Fitzgerald and one of Davis' chief financial advisors in this takeover fight, concealed and indeed misrepresented the relevant facts in his responses to deposition questions clearly put and specifically designed to elicit them.* Thus, Orbe was asked:

- Q. Have there been any other efforts direct or indirect by Cantor, Fitzgerald to supply financing, provide financing, ascertain the possibility of a source of financing to Security [Management Co.], Mr. Davis, or D-2?

* The transcript of Orbe's testimony was previously filed herein in conjunction with the original motion papers.

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A. I believe that Mr. Miller might have contacted one or two banks.

Q. When?

A. I don't know.

* * * *

Q. Mr. Orbe, other than that [referring to the bank], do you know of any other attempt to arrange or procure or potentially secure financing for D-Z, Davis or Security?

A. No.

-- Orbe Tr., pp. 274, 276.

8. This testimony was contrary to fact. For subsequent discovery has now disclosed that when plaintiff's attempts to sell its 6% promissory notes foundered, Orbe and Cantor, Fitzgerald actively sought to arrange institutional sources of funds to finance plaintiff. The evidence establishes that Orbe personally introduced Davis to at least two of Davis' "Sources" "A", "B", "C", and "D". (Davis Tr. pp. 85, 129). And the evidence establishes that on June 27, 1974 -- only 20 days before Orbe's testimony denying knowledge of any attempts to procure financing for D-Z -- a formal commitment letter (Exhibit "C" hereto) was entered into between D-Z and one such source, Financial Resources Corporation (FRC), in which FRC committed itself to loan \$2,700,000 to D-Z to finance a tender offer for 350,000 shares of the stock of NJB, \$5,000 being paid to FRC by D-Z to procure such commitment. Only shortly thereafter, the commitment was apparently hurriedly cancelled by D-Z in the face of this

litigation and the realization that -- precisely because of the role of Orbe's Cantor, Fitzgerald (a registered broker-dealer) in having brought D-Z to FRC -- the financing constituted an unquestionable violation of Regulation T. (Davis. Tr. 89-90.) The entire transaction in which Orbe had personally participated from first to last, as noted above, had occurred only shortly before Orbe's flat sworn denial of any knowledge of a Cantor, Fitzgerald role in attempting to procure any such financing for D-Z.

9. Nor, as is now known, were D-Z's efforts to procure financing limited to the FRC transactions. In addition thereto three other "Sources" -- including at least one with whom D-Z is still negotiating -- were being actively pursued by D-Z. (Davis Tr. pp. 78-79, 114, 129.) One of the three "Sources" was likewise the result of the activities of Cantor, Fitzgerald. (Davis Tr. pp. 129-130.) None of these facts have ever been disclosed in any of plaintiff's 13D filings. This non-disclosure is all the more misleading in view of the clear impressions conveyed by plaintiff's 13D filings that the sources of its funds for its purchases of NJB shares were the proceeds of the purported "private placement" of 6% notes, a \$75,000 advance from Davis and margin loans against its NJB stock purchases, while omitting to state plaintiff's preconceived plan to finance its NJB stock purchases from other sources.

10. While the details of the proposed transactions under

discussion by D-2 differ in some respects -- notably in that some of the deals would finance a formal tender offer, while others would finance an "accumulation" program* (see Davis Tr., pp. 77-83, 142) -- each and every one of them contemplates the securing of a massive infusion of outside funds to finance a takeover of NJB. These financing negotiations are clearly serious and meaningful ones, likely to result in a commitment. Indeed, as noted above, Davis' deposition testimony revealed that plaintiff had actually entered into an agreement with FRC pursuant to which FRC was to lend plaintiff \$2,700,000 to finance a formal tender offer for 350,000 NJB shares.* Yet, notwithstanding that plaintiff's dealings with its various "Sources" of additional financing are thus manifestly the major financial element in its takeover plan, plaintiff's 13D amendments make no reference to them whatever.

11. Moreover, it is now clear that plaintiff intends to use NJB funds to repay whatever interim financing it obtains in consequence of these ongoing, heretofore undisclosed negotiations. Thus, it is significant to note that the amounts which the unnamed sources are or were to make available are very substantial -- from

* As is further set forth below (see ¶¶ 28-31, *infra*) and in the accompanying Memorandum of Law, both the formal tender offer approach and the accumulation approach to gaining control constitute "tender offers" within the meaning of Section 14 of the Exchange Act and the rules promulgated thereunder.

** Davis testified that FRC was his "Source 'B'" (Davis Tr., p. 86).

\$1.5 million ("Source 'D'", Davis Tr., p. 142) to \$3.5 million ("Source 'A'", Davis Tr., p. 81) -- far greater than plaintiff's own resources or assets. Indeed, Davis' deposition testimony relating to compensation of plaintiff's backers, while itself predictably evasive on this count, indicates that the use of NJB's assets to repay plaintiff's debt lies at the heart of the D-Z scheme. Thus, when Davis was examined about the manner in which it was contemplated that a \$2,000,000 loan from "Source 'C'" would be repaid, he testified as follows:

"Q. Did you discuss whether it [the \$2,000,000 loan from Source "C"] would be repaid?

A. No.

Q. Did you discuss how it would be repaid?

A. No.

Q. Did you discuss the source for repayment?

A. No.

Q. Did you have any thoughts on the subject?

A. I always have thoughts.

Q. What thoughts did you have as to how you would repay \$2 million?

A. From earnings.

Q. Of what?

A. Of the entity.

Q. NJB?

A. I said entity, borrowing.

Q. Were you talking to Source C about NJB?

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A. I was talking to Source C about D-Z, and acquiring NJB stock.

Q. And what earnings did D-Z have or did you anticipate D-Z would have?

A. I don't know."

-- Davis Tr., pp. 125-26.

12. Moreover, Davis testified that he discussed with his "Sources" the "concept" which he had laid out in a letter to Mr. Saul Becker in which Davis outlined his plans for a tender offer to shareholders of a real estate investment trust. (A copy of this letter is annexed hereto as Exhibit "D".) Thus, as Davis testified:

"Q. And what were the negotiations with Source A?

A. We never really negotiated, we only outlined concepts.

Q. Did you meet with the people?

A. Yes.

Q. What concepts did you outline to them?

A. Generally what is revealed in the letter, in the 13(d)."

-- Davis Tr., p. 80 (emphasis added).

Yet in that letter it is stated that "[t]he corporation has sufficient value and assets to retire the original indebtedness" -- clearly establishing that the ultimate source of funds for the takeover is to be the target, NJB, itself.

13. Yet plaintiff's 13Ds give not the slightest hint that it intends to use major amounts of NJB funds to repay the antici-

pated massive commitments of D-Z. On the contrary, the statement in plaintiff's original 13D that plaintiff's "future actions may include: (i) Acquisition of additional NJB shares * * *." still stands completely unmodified. (See Kantor Affidavit ¶ 21; Exhibit "C" thereto, at p. 3.) Thus, plaintiff is currently involved in ongoing negotiations directly and profoundly affecting the status, credit and perhaps the very viability of NJB, while plaintiff's 13Ds reflect absolutely nothing about the plans which these negotiations are intended to implement. Plaintiff's failure to disclose these plans means not only that plaintiff did not disclose fully and candidly the "Source of Funds" which it proposes to use to gain control of NJB, as required in Item 3 of the 13D, but likewise that plaintiff failed to disclose the true "Purpose of [the] Transaction" with respect to plaintiff's plans for NJB after it gains control, as required in Item 4 of the 13D. It is clearly an extremely material matter of the highest importance to NJB's shareholders that plaintiff intends to use NJB's own assets to repay the "Sources" of plaintiff's interim financing if plaintiff gains control.

14. Indeed, plaintiff's failure to disclose its true "purpose" should it gain control now stands revealed as even more egregious than it appeared when the Kantor Affidavit was submitted (see Kantor Affidavit ¶ 24). Thus, the letter to Saul Becker recently produced by plaintiff (Exhibit "D" hereto) discloses numerous concrete and specific purposes of plaintiff to make fundamental and far-reaching changes in the management and

operations of NJB once plaintiff has acquired a controlling interest, including: (a) that "[a]t some point in time we would cancel the advisory contract" (Exhibit "D", p. 3); (b) that after getting 66-2/3 per cent of the stock it would be voted "to eliminate the trust type of ownership" (id., p. 4); (c) that "[i]t is also my intention to merge our operating company into the corporation on a stock-for-stock basis" (id.) and (d) that the debt incurred in connection with the transaction "would be assumed by" NJB and retired out of its own "value and assets". Moreover, as noted above (§ 12), Davis is now discussing with his various "Sources" of financing "generally what is revealed in the letter," i.e., Exhibit "D". It is clear that Davis' testimony read in its totality indicates that the plans revealed in the letter above have never been abandoned. It is submitted that if one simply places Exhibit "D" side-by-side with plaintiff's 13Ds, the true enormity of plaintiff's failure to comply with the applicable statutory requirements is manifest.

- B. The consummation of any of the financing deals now being negotiated by plaintiff will constitute additional margin violations by plaintiff and Cantor, Fitzgerald

15. Davis' deposition testimony disclosed not only that he is negotiating to obtain major financing for his takeover bid, but also that he has received assistance from Cantor, Fitzgerald in connection with these negotiations. It is submitted that if, under these circumstances, any of these "Sources" make "purpose" credit available to plaintiff, and such credit is used to pay any

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amount more than 50 per cent of the purchase price of any NJB shares, Cantor, Fitzgerald will be in flagrant violation of Regulation T, and plaintiff in violation of Regulation X. Indeed, Davis' own deposition testimony has revealed that plaintiff's tender offer financing arrangement with FRC had to be abruptly withdrawn because it would have involved plaintiff and Cantor, Fitzgerald in just such a violation (Davis Tr., pp. 89-90).

And, Davis' testimony further establishes that any other credit transactions between plaintiff and a "Source" arranged for by Cantor, Fitzgerald would likewise and for the same reasons be in contravention of Regulations T and X* (Davis Tr., pp. 93-97).

16. It is obvious that the FRC deal fell through because of the conjunction of two facts -- both of which are inherent in the other transactions now in negotiation: (a) that Cantor, Fitz-

* Manifestly, any financing expressly structured as a loan transaction would be within Regulation T. While Davis has testified that his deal with "Source 'D'" might be styled an "equity participation" in D-Z (Davis Tr., pp. 140-41), it is submitted that the name which the parties might give to such a "participation" -- i.e., equity rather than debt capital -- cannot conceivably exempt it from the requirements of Regulation T that "extensions of credit" for the purpose of purchasing securities meet certain legal tests. See Memorandum of Law, pp. 87-91. In this connection, the facts that D-Z is merely a shell corporation with no other assets than its NJB shares, and further that, as Davis testified, "D-Z was going to use the money to gain control, if they could, of NJB" (Davis Tr., p. 142), indicate that in substance this transaction would involve an extension of credit within the purview of Regulation T.

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gerald, a brokerage firm clearly subject to Regulation T, played a major active role in arranging the deal; and (b) that either the proceeds would be used to finance stock purchases in their entirety, or margin loans also made by (or arranged by) Cantor, Fitzgerald would supply the only other funds. Thus, with reference to Cantor, Fitzgerald's role in arranging financing for plaintiff D-2, Davis' testimony is clear that Cantor, Fitzgerald's William Miller has been involved in plaintiff's discussions with "Source A" (Davis Tr., p. 84), and that Orbe of Cantor, Fitzgerald introduced Davis to "Source D" in April (id., p. 129). Indeed, plaintiff seems to have an arrangement with Cantor, Fitzgerald not only that Cantor, Fitzgerald will introduce plaintiff to sources of financing, but that Cantor, Fitzgerald will actually share in the proceeds of any financing it "assist[s] . . . in arranging" for plaintiff. Thus, in late April, Cantor, Fitzgerald executed and mailed to plaintiff a letter which stated, inter alia, that: "If we assist you in arranging the financing required to complete a transaction other than margin financing, our compensation shall be five per cent of the first million dollars, four per cent of the second million dollars, three per cent of the third million dollars, two per cent of the fourth million dollars, one per cent of the fifth million

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dollars, and one per cent thereafter." (A copy of the letter is annexed hereto as Exhibit "E".)*

17. Moreover, it is apparent that the second defect in the FRC transaction inheres in the other transactions now under discussion, i.e., that Davis now intends either to use 100 cents of every dollar made available to him by his "Sources" to pay for shares or to use margin loans from Cantor, Fitzgerald in conjunction with the funds from his "Sources". Thus, Davis' testimony is that he has virtually exhausted his sources of margin financing -- indeed, completely exhausted his accounts at Cantor, Fitzgerald and Ladenburg, Thalmann & Co., his two principal "margin angels" in his takeover venture (Davis Tr., pp. 280-81). While Davis further testified that plaintiff's margin account at Cantor, Fitzgerald might be reactivated, and that he might still have access to margin loans from Hayden, Stone (Davis Tr., pp. 281-84),**

* While Davis testified that "I am not sure this was ever executed [i.e., by plaintiff]," he further stated that: "Basically it was an arrangement, if they, as it related to a CNA type transaction, that was the intention; or if they found a joint venture partner." (Davis Tr., p. 321.) Moreover, regardless of whether the letter was ever formally executed by Davis, it is clearly the understanding of William Miller of Cantor, Fitzgerald that they will be compensated if they arrange such financing. As Miller bluntly stated: "I had an expectation that when I work I don't work for nothing" (Miller Tr., pp. 105-06). Moreover, Miller specifically testified that if Davis makes a deal with "Source 'D'", he expects to be compensated therefor (Miller Tr., p. 109).

** Cantor, Fitzgerald also arranged for plaintiff's margin account at Hayden, Stone. (Davis Tr., p. 279.)

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plaintiff's use of such funds in conjunction with funds of the "Sources" would not negate the margin violations since Kantor, Fitzgerald would be directly responsible for, or actively involved in, the arrangements for 100 per cent financing of stock purchases.

18. Indeed, it is also clear that the "Sources" with which plaintiff is negotiating would violate Regulation G if they were to enter into the contemplated transactions. Thus, if they furnished 100 per cent financing for stock purchases and were secured within the meaning of that Regulation, the violation would be patent. That they would almost certainly be secured in that sense is indicated by the facts that: (a) the \$2,700,000 loan to be made in the aborted FRC transaction was by its terms to be secured by the shares of NJB stock; (b) that loan was to be personally guaranteed by Davis, among whose assets are one-half the shares of D-Z, which in turn has virtually no other assets than its NJB shares; and (c) that it is inherently inconceivable that the "Sources" would make such huge advances to a shell company such as D-Z without such security.

19. Based on the revelations of these contemplated transactions in Davis' testimony, it is submitted that the injunction sought by the instant motion should be granted not only because of actual, consummated violations of the securities laws by plaintiff and its confederates, but to perform the classic equitable function of preventing the consummation of an imminent threatened wrong. For it is clear from Davis' testimony that the effectuat-

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ion of plaintiff's unlawful purposes awaits only the green light from one of Davis' "Sources". As Davis candidly stated: "If it was possible, that somebody came along and gave me all the money, I would entertain a tender once again" (Davis Tr., p. 76).

- C. The funds which plaintiff has already borrowed to finance its purchases to date were obtained in violation of the Securities Act, the Investment Company Act and the Margin Regulations

20. As is fully set forth in the Kantor Affidavit (¶¶ 26-32), it was clear even from the initial discovery herein that plaintiff's alleged private placement of notes had completely failed to satisfy the requisites for a private placement exemption. Further discovery has not only served to establish this fact conclusively, but to establish the existence of other, heretofore undisclosed violations in that transaction.

21. Thus, it was demonstrated in the Kantor Affidavit that the alleged private placement through which plaintiff has financed its purchases of NJB shares was built upon major, glaring failures to disclose required private placement information (see Kantor Affidavit ¶¶ 29-30), since the "Private Placement Memorandum" which Zimmerman distributed to the note purchasers was a mass of evasions and inconsistencies. Yet it is now clear that there was even less in the way of meaningful disclosure to the note purchasers than Zimmerman at his deposition claimed there had been. For since the original motion papers were filed, the people on the other side of the note transactions --

the note purchasers themselves -- have been heard from; and their evidence reveals that they knew even less about this curious transaction than the completely inadequate "Private Placement Memorandum" disclosed.

22. Thus, Zimmerman's sworn testimony at his deposition that all the noteholders contacted by him were approached only after they had seen the "Private Placement Memorandum" (Zimmerman Tr., pp. 181-82) is flatly contradicted by the testimony of noteholders Bernard Kroll (Kroll Tr., pp. 65-73, 78-80) and Dr. Harold B. Levin (Levin Tr. pp. 32-39), both of whom were approached and indeed solicited by Zimmerman long before they were supplied with a copy of the Memorandum -- indeed, they were solicited by Zimmerman even before the Memorandum had in fact been prepared. In fact, it is now clear that several of the noteholders had no idea even after they received the Memorandum what plaintiff's takeover plan was all about -- or even just what a "REIT" is -- and that no steps were taken to assure that they comprehended -- or indeed simply that they had read -- the Memorandum (see, e.g., Levin Tr., pp. 97-101, 135-36; Levow Tr., pp. 48-49). Moreover, the name of NJB as D-2's target was not even disclosed to the noteholders (Kantor Affidavit ¶ 29) -- and indeed was affirmatively withheld -- based upon a commitment to supply the purchasers after they had invested their money with that and other relevant information by sending them D-2's Schedule 13D (Exhibit "H" to Kantor Affidavit, at p. 4). It is now clear that several of the noteholders in fact never even

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received plaintiff's 13D filing after the fact of their investment (see, e.g., Levin Tr., pp. 74-88).*

23. The deposition testimony of the noteholders also indicates that many of them misunderstood the basic terms of the note transaction. Thus, for example, noteholder Seymour P. Weinberg testified that Zimmerman told him he would have the right to convert his note into the "units" of D-Z stock and notes described in the "Private Placement Memorandum" (Weinberg Tr., pp. 55-57), although in fact the Memorandum carefully refrains from giving the noteholders any such right (Kantor Affidavit ¶ 30), and Zimmerman refused to state that the noteholders in fact had such a right although he testified that such conversion was "contemplated" by him. (Zimmerman Tr., pp. 134-37). Moreover, the noteholders did not understand that should they purchase D-Z stock as part of the units, they would be paying more than 12 times per share what Davis and Zimmerman had paid for their promoter's shares (see Kantor Affidavit ¶ 30). Indeed, not only did noteholder Dr. Harold B. Levin testify that he had not understood the edge the promoters were giving themselves,

* Of course, considering how woefully inadequate and misleading the 13Ds have proved to be, even proper distribution of them as promised could not conceivably have satisfied the disclosure requirements of the Securities Act.

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but he actually testified when confronted with the true facts:
"That's news to me" (Levin Tr., pp. 144-51).*

24. It is also now clear that the solicitation of prospective purchasers by plaintiff's agents was far more extensive -- in terms of the people who made solicitations, the number of people solicited, and the places where such solicitations occurred -- than even the Zimmerman testimony had indicated. Thus, not only does Davis' testimony confirm that no limits were set on the number of people who might be solicited (Davis Tr., p. 175), but Davis disclosed that after Zimmerman's selling effort in Atlanta faltered, Davis himself personally solicited numerous individuals other than those contacted by Zimmerman (*id.*, pp. 187-193). Davis also disclosed that Ralph Becker and Saul Becker, officers of plaintiff, also made efforts to obtain buyers for the D-Z note offering (*id.*, pp. 199, 211-212A). In addition, Davis was soliciting groups of persons (*id.*, pp. 200-203) and persons who in turn might produce still other prospective purchasers for the notes (*id.*, pp. 205, 211). Moreover, it is noteworthy that the solicitation of prospective note purchasers was not geographically limited. Thus, Davis acknowledged that solicitations occurred not only in and around Atlanta but also in New York (Davis Tr.,

* Considering plaintiff's callous attitude toward fulfilling the stringent requirements for qualification of its note sales as a valid "private placement", it is not surprising that plaintiff did not even bother to secure an investment representation from each of the purchasers (see Levow Tr., pp. 74-75).

pp. 199, 201), Florida (id., p. 211) and Chicago (id., p. 213),* and further stated that he, Becker, and Zimmerman had been specifically advised by counsel that "if you went out of the state to see somebody, it was okay" (id., p. 177). In sum, it is now clear that solicitations which may have started with Zimmerman in and around Atlanta proliferated into a far-flung effort to obtain purchasers for the notes anywhere they could be found.

25. Plaintiff's manifest violations of the registration requirements of both the Securities Act and the Investment Company Act, and its misrepresentation of its public offering of its notes as a "private placement" as well as its failure to disclose that it was an unregistered "investment company" in its Schedule 13D or any of the five amendments thereto, clearly entitle the Trustees to the injunction sought on this motion.** (See accompanying Memorandum of Law, pp. 99-113; Kantor Affidavit ¶¶ 22, 31-32.) However, evidence disclosing wholly distinct violations in the note transactions has also come to light through further discovery -- implicating plaintiff, in its search for borrowed money, in yet further violations of the margin regulations.

* While Davis testified that the Chicago meeting, although concerned with the financing of plaintiff's plan, did not involve discussion of the \$50,000 notes, he also indicated that he may well have "left a [private placement] memorandum" with the Chicago securities (id., p. 214).

** The Securities Act was also violated when noteholder Kroll made what amounts to a secondary distribution of his notes to two other people -- a distribution only revealed in plaintiff's Amendment No. 5 to its 13D (Exhibit "B" hereto) when it was uncovered upon Mr. Kroll's deposition (Kroll Tr., pp. 121-123).

26. Thus, it has been discovered that no fewer than three of the D-2 note purchasers paid for their notes not out of their own funds but from the proceeds of bank borrowings. For the reasons set forth herein and in the accompanying Memorandum of Law, it is submitted that the banks in question thereby violated Regulation U, and the noteholders and plaintiff as beneficiaries of the illegal loans violated Regulation X.

27. While Zimmerman had testified that noteholder Bernard Kroll borrowed a total of \$100,000 from the Mercantile National Bank (at 1 per cent per month)* to finance his purchases of two of plaintiff's promissory notes (paying 6% per annum) (Zimmerman Tr., p. 206), it is now known that three other noteholders did so as well. Thus, noteholder Harvey Jacobson testified that he borrowed \$50,000 from the Citizens & Southern Bank, at an annual rate of 10 per cent, to finance his note purchase (Jacobson Tr., p. 53), noteholder Harold A. Levow revealed that he too borrowed the money to purchase his D-2 note from a bank (Levow Tr., p. 62) and noteholder Seymour Weinberg borrowed his funds to purchase the notes from the First National Bank at an annual rate of 8 percent and secured the loan with his personal holdings of common stock (Weinberg Tr., p. 75). In light of the requirements of the applicable margin regulations, it is noteworthy that the Weinberg bank loans were secured by margin stock, and to the extent that the other loans are ultimately indirectly secured by the NJB stock purchased with

* The interest rate -- which of course is twice the amount Kroll has been promised by plaintiff -- was revealed only in the deposition of Kroll himself (Kroll Tr., p. 42).

the proceeds of the notes, such loans are clearly undersecured within the strictures of Regulation U.

D. Further discovery confirms that plaintiff has been making a "creeping" or de facto tender offer without complying with the Williams Act

28. Additional evidence confirming that plaintiff has been engaged in an illegal tender offer for NJB shares (see Kantor Affidavit ¶ 37-39) has also emerged in further discovery. Thus, it is now known that plaintiff has not only been engaged in systematic, extensive purchases of NJB shares with the intent to gain control of NJB (see Kantor Affidavit ¶¶ 37, 38) but also that such purchases continued to the very eve of the filing of the instant motion (see Exhibit "B", p. 3), and that plaintiff had actually arranged financing for a formal tender offer on June 27, 1974 which had to be abruptly cancelled when its illegality was recognized (see ¶ 10, supra). Moreover, there is now of record Davis' explicit testimony that he still intends to take control (Davis Tr., pp. 59-60), and indeed, still intends to make a formal tender offer if he can get the money for it (see ¶ 19, supra). This pattern of continuing purchases, with a view to gaining control, has the precise "shareholder impact" of a formal tender offer and thus constitutes a "tender offer" so as to bring into operation the requirements of the Williams Act (see the accompanying Memorandum of Law, pp. 65-80).

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29. Furthermore, your deponent would note that there is now additional evidence that, in addition to the fact that plaintiff's purchases are being made with a control purpose, plaintiff's effort has been accompanied by repeated public announcements of plaintiff's intention. Thus, there have been numerous widely circulated newspaper, broad tape and other reports of plaintiff's efforts to gain control which have largely been generated by the very commencement of this litigation. (Copies of five such reports are annexed hereto as Exhibits "F" through "J".)

30. Finally, there is now before the court a detailed account of an extensive telephone solicitation of large NJB shareholders through which plaintiff attempted to procure blocks of NJB shares after the solicitation of the blocks referred to in the Kantor Affidavit (¶¶ 37-38) -- thereby further evidencing its intent to take its bid for control to the investing public. The deposition testimony of William Schwartz, a vice-president of Cantor, Fitzgerald, discloses that in mid-June of this year, Mr. Schwartz called almost two dozen NJB shareholders, in an effort to buy a block of 5,000 to 10,000 -- and possibly more -- NJB shares for plaintiff (Schwartz Tr., p. 25). In making these calls, Schwartz employed two summary shareholder lists -- one showing holders of more than 10,000 shares, another showing holders of from 1,000 to 9,999 shares (Schwartz Tr., pp. 26-30) -- which were given to him by William Miller, senior vice-president of Cantor,

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Fitzgerald, for this purpose.* (Copies of the aforesaid lists bearing Schwartz's notations made during his phone calls are annexed hereto as Exhibits "K" and "L".) In his conversations, Schwartz indicated that "he was a buyer of 5,000 to 10,000 shares" (Schwartz Tr., p. 137; see also, e.g., id., at pp. 165-167), and that he represented the largest NJB shareholder (id., p. 138). From the point of view of "shareholder impact", it is also noteworthy that Schwartz may have indicated in some of these same conversations that his client was unhappy with management and was in favor of calling a special shareholders' meeting to change NJB's management (see, e.g., Schwartz Tr., p. 137). Finally, it is highly significant in this connection that many of the calls were made to banks, brokers and nominees, who represented numerous individual NJB shareholders.

31. In sum, further discovery herein clearly confirms that plaintiff has engaged in a tender offer in all but name. Yet, so far as your deponent is aware, plaintiff has never to this date even attempted to comply with any of the requirements of the Williams Act applicable to such offers. See Memorandum of Law, pp. 81-86.

* At the same time or shortly thereafter, Miller asked Schwartz to use the list to solicit shareholders concerning their "attitude towards management," which Schwartz proceeded to do, in violation of the proxy rules (see ¶¶ 32-36, infra). In this connection, it is noteworthy that Miller obtained the shareholders' list as a result of plaintiff's litigation in Massachusetts prior to the June 13 NJB meeting, in which plaintiff claimed that it needed the list not in order to facilitate purchases of shares, or to unlawfully solicit proxies, but to lawfully communicate with other shareholders. Plaintiff has at no time ever used the list for this purpose.

Supplemental Affidavit of Bertram M. Kantor

E. Plaintiff and Kantor, Fitzgerald have
indisputably violated the Proxy Rules

32. As is more fully set forth in the Kantor Affidavit (¶¶ 40-45), plaintiff's takeover plan consists not only of acquiring control of NJB by share purchases, but of attempting to convene a special shareholders meeting for the purpose of ousting existing management. Discovery has now made it indisputably clear that plaintiff's efforts to implement the second branch of its takeover plan -- i.e., the convening of a special shareholders' meeting -- have involved major violations of the securities laws, and specifically of the Proxy Rules promulgated by the Securities and Exchange Commission under the Exchange Act. While, the evidence as to plaintiff's unlawful proxy solicitations was substantial at the time of submission of the original motion papers (see Kantor Affidavit ¶¶ 40-45), revelations in the subsequent deposition testimony of Kantor, Fitzgerald officers supply compelling and, indeed, conclusive evidence of extensive proxy violations on plaintiff's part.

33. Thus, it has now been conclusively established that the mysterious "Mr. Schwartz" who was placing calls to NJB shareholders (see Kantor Affidavit ¶ 41) was in fact William Schwartz, a Vice President of Kantor, Fitzgerald, plaintiff's investment bankers. It has also now been conceded that Mr. Schwartz was provided by William Miller, Senior Vice President of Kantor, Fitzgerald, with a shareholders list of NJB as well as with two sum-

Supplemental Affidavit of Bertram M. Kantor

mary lists prepared by Cantor, Fitzgerald containing the names and addresses of holders of in excess of 1,000 NJB shares. And the depositions of Mr. Schwartz himself, as well of Mr. Miller, have revealed that the shareholders lists which Miller gave Schwartz were used not only in efforts to buy NJB shares (see ¶ 30, supra), but also in making telephone calls to NJB shareholders in order to obtain support for Davis' plan to convene a special shareholders meeting for the purpose of ousting the existing NJB management.

34. Specifically, Cantor, Fitzgerald personnel have now testified herein that on June 18 Miller asked Schwartz to call some of the people on the list to find out "their attitude toward management" (Schwartz Tr., p. 35; Miller Tr., p. 23).^{*} Miller explained to Schwartz that a special meeting of shareholders could be convened by the request of 20 per cent or more of the beneficial owners of NJB and that plaintiff was desirous of convening such a special meeting in order to oust existing management (Miller Tr., p. 24). Schwartz, by his own admission, had at least 13 telephone conversations with various NJB shareholders with respect to the subject of calling a special shareholders meeting to oust existing management of NJB. In these telephone conversations, Schwartz reached many more than the 10 shareholders specified in the Proxy Rules promulgated by the S.E.C. Thus, among the shareholders with whom Schwartz took up the matter of a special shareholders meeting were a bank, a self-styled

^{*} As is noted below (¶ 35), there is independent evidence of record herein that Schwartz made proxy solicitations earlier than June 18.

Supplemental Affidavit of Bertram M. Kantor

investment company and shareholders who had other members of their immediate families who were likewise NJB shareholders. (Schwartz Tr., pp. 73-82, 95-102, 108-120, 123-128, 131-138, 142-146, 149-160, 162-182).^{*} In these calls, Schwartz was clearly "soliciting" within the meaning of the Proxy Rules. According to his own testimony concerning these conversations, Schwartz would typically identify himself as being affiliated with Cantor, Fitzgerald and would advise the recipient of the call that he represented a client who was a large shareholder of NJB, that his client was dissatisfied with existing management and that his client wished to call a special meeting of shareholders to oust management. (See, e.g., id., pp. 123-128, 131-134, 151-160 and passim.) Schwartz typically would then inquire whether the listener would be willing to "join in an effort to obtain a special meeting" (e.g., Schwartz Tr., pp. 99, 128). All the foregoing conduct is conceded by Miller and Schwartz. Nor is there any doubt that Schwartz revealed the purpose of the possible special shareholders meeting to the NJB shareholders with whom he spoke:

"Q. In all the calls you made to individuals,
* * * [w]hen you mentioned the possibility of such
a shareholders meeting, did you inform the caller
as to the purpose of such a special meeting if such
a meeting should, in fact, occur?

A. I may have.

Q. What is your best recollection; that you
did or did not?

^{*} Moreover, it is only a fortuity that Schwartz did not reach many more shareholders. For his testimony is clear that he actively called the numbers of many others, but either could not get through to them, or did not receive a call back.

Supplemental Affidavit of Bertram M. Kantor

A. If the conversation got around to it, we may have -- I may have indicated that the purpose of the special meeting might be to change the Board.

Q. I take it that you did not tell the people that there was any other purpose to a special shareholders meeting other than to change the Board; in other words, that you were seeking a special meeting to tell of assets or anything like that?

A. No."

-- Schwartz Tr., pp. 159-160.

35. Moreover, independent evidence establishes that Schwartz's solicitation of proxies was actually even more extensive than Schwartz himself is willing to admit. Thus -- notwithstanding Schwartz's claim that he did not commence to make "solicitation calls" as distinct from "stock purchase" calls until June 18 -- at least one shareholder (Maki) was contacted on June 17 by Schwartz who told Maki that he [Schwartz] represented a "proxy group" and asked Maki if Maki was "interested in joining a group to call a special shareholders meeting of NJB to elect new trustees."* Indeed, Schwartz's own notations on the summary shareholders list which he was using to make these telephone calls (Exhibit "L" hereto) contains irrefutable evidence

* Maki Affidavit ¶ 3. It is quite clear that the Schwartz telephone conversation with Maki took place on June 17. The Maki affidavit places the call on either the 3rd or 4th Monday in June, i.e., either June 17 or 24. Independent evidence has established that the actual date was June 17 and, indeed, Schwartz by his own testimony conclusively establishes that the Maki conversation took place on June 17 inasmuch as Schwartz was no longer making calls by June 24. (See page 183 of the Schwartz deposition wherein he testified that he made no calls to shareholders of NJB subsequent to June 18.)

Supplemental Affidavit of Bertram M. Kantor

that Schwartz commenced making "proxy calls" prior to the June 18 date claimed by Schwartz in his testimony. Thus, for example, Exhibit "L" contains the notation "6/17" in Schwartz's handwriting next to the names of shareholders Jacksonville National Bank, Alick [sic] Levine and Harry G. Wiberg and Schwartz in his testimony specifically admitted discussing the matter of a special shareholders meeting with the Jacksonville National Bank, Levine and Wiberg on June 17. (Schwartz Tr., pp. 135-138, 140, 142-146, 179-182.)

36. Indeed, Schwartz's own notes on his copy of the shareholders list concerning the Maki conversation -- now clearly established as having taken place on June 17 -- state "will not join in", telling confirmation that Schwartz's "proxy calls" in fact started prior to the June 18 date claimed by Schwartz in his testimony (Exhibit "L"). Likewise, although Schwartz claims that he commenced his June 17 telephone conversation with shareholder Wiberg by identifying himself as a "buyer" and only then launched into a proxy solicitation (Schwartz Tr., pp. 179-182), Wiberg's account of the conversation is devoid of any mention by the caller of any intent to buy Wiberg's shares (Wachtell aff. ¶¶ 4 and 5). Moreover, explicit evidence that Schwartz was actually seeking to organize a shareholders group in support of plaintiff's avowed purpose to seek control of NJB is supplied by notations made by Schwartz on his copy of the shareholders list that persons to whom he spoke who were favorable to plaintiff's proposal "may give proxy" and "will give proxy". (See Exhibit "L", Litinsky, p. 5 and Staub, p. 7.)

Supplemental Affidavit of Bertram M. Kantor

37. It is thus manifest even from Schwartz's own testimony and documents that plaintiff violated the Proxy Rules of the Securities and Exchange Commission by soliciting proxies from in excess of 10 shareholders in relation to a special shareholders' meeting. It is of course undisputed that neither plaintiff nor Cantor, Fitzgerald had on file with the Securities and Exchange Commission the necessary proxy material nor supplied any proxy material to the NJB shareholders in connection with the solicitation (Schwartz Tr., p. 197; Miller Tr., pp. 33-34). It is equally undisputed that both the "stock purchase" and "proxy solicitation" calls made by Schwartz to the NJB shareholders were made possible by the fact that Cantor, Fitzgerald had in its possession a copy of the NJB shareholders list furnished to plaintiff by NJB in compliance with the Order of the Massachusetts Court. It is clear that the shareholders list was ordered to be furnished to plaintiff for its legitimate use and not to enable the illegal "stock purchase" and "proxy solicitation" telephone calls made by Cantor, Fitzgerald on plaintiff's behalf.

Conclusion

38. In light of the additional evidence which has been adduced that plaintiff and its confederates have pursued and are pursuing plaintiff's takeover bid in flagrant disregard of the securities laws, it is now clearer than ever that this

Supplemental Affidavit of Bertram M. Kantor

Court must issue the preliminary injunction prayed for herein. The record developed in the discovery described in this affidavit and in my earlier affidavit of July 19, 1974 clearly demonstrates the need for injunctive relief herein and amply satisfies the legal standards required to be met in order to obtain a preliminary injunction.

WHEREFORE, your deponent respectfully submits that the instant motion should in all respects be granted.


BERTRAM M. KANTOR

Sworn to before me this
2nd day of August, 1974.


Notary Public

PETER D. MAKENNA
Notary Public, State of New York
No. 41-708870
Qualified in Queens County 74
Commission Expires March 30, 1975

EXHIBIT A--AMENDMENT NO. 4 DATED JULY 17, 1974
ANNEXED TO SUPPLEMENTAL AFFIDAVIT
OF BERTRAM M. KANTOR

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

AMENDMENT NO. 4

to

SCHEDULE 13D

Pursuant to Section 13(d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
959 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z Investment Company
420 14th Street N.W.
Atlanta, Georgia 30318

Address copies of all communications to:

Joseph B. Russell, Esq.
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

Amending Items 3 and 5.

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Exhibit A Annexed to Supplemental Affidavit of Bertram M. Kantor

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this amendment, approximately \$999,230 has been expended by D-Z for the purchase of the 160,000 NJB Shares referred to in Item 5 below. Approximately \$519,170 thereof was paid out of D-Z's own funds, and the balance of the purchase cost was obtained by margin borrowings from Cantor, Fitzgerald & Co., Inc., Beverly Hills, California, and from Ladenburg, Thalmann & Co., New York, N. Y., in each case secured by pledge of the NJB Shares purchased on margin through such broker; an additional \$62,500 was borrowed from a bank and is secured by pledge of 25,000 NJB Shares which are not otherwise encumbered.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

Following the filing of the statement to which this amendment relates, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB Shares, other than purchases, as follows:

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19 - May 28 (previously reported)	107,500
May 22	200
June 5	500
June 6	500
June 14	6,900
June 17	3,100
June 18	3,000
June 26	3,000
June 27	8,700
July 1	2,200
July 2	10,000
July 3	12,900
July 12	1,100
July 15	400
TOTAL	160,000

*Exhibit A Annexed to Supplemental Affidavit
of Bertram M. Kantor*

All of the above purchases were made on the American
Stock Exchange, except for the following portions thereof made
over the counter:

<u>Date of Purchase</u>	<u>Number of Shares</u>
April 23, 1974	60,000
May 24, 1974	15,000
May 28, 1974	10,000
June 14, 1974	5,000
July 3, 1974	7,200

SIGNATURE

The undersigned corporation certifies that to the best
of its knowledge and belief the information set forth in this
Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By

Bruce R. Davis,
President

July 17, 1974

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EXHIBIT B--AMENDMENT NO. 5 DATED JULY 19, 1974
ANNEXED TO SUPPLEMENTAL AFFIDAVIT
OF BERTRAM M. KANTOR

HARRY M. WACHTEL
FREDERICK BAUM
ABRAHAM G. LEVIN
JOSEPH B. RUSSELL
JACK G. FRIEDMAN
IRVING CONSTANT
RAYMOND S. HARRIS
DAVID H. BRAUNER
BERNARD STEBEL
MARTIN A. COLEMAN
STANLEY L. SALAN
RONALD GREENBERG
MICHAEL J. WEINBERGER
GERALD HARRIS
MAX WILD
ROBERT A. LEVITAS
SAMUEL H. KOENIGSBERG
RICHARD SHEINBERG
PAUL H. ADOFFSKY

SEYMOUR A. CASPER
STEPHEN A. MARSHALL
EDWARD BLIEMAN
GEORGE H. WEISS
JEFFREY B. HARRIS
CARL ROBERT ARON
ALLAN H. ROSENBLUM
THOMAS G. BARRETT
ARTHUR D. SEDERBAUM
D. LOGAN POTTS
BARRY A. ADELMAN
BRIAN L. SILZIN
BRUCE H. SAUDERER
ROBERT D. GREENFIELD
ROBERT L. SAMNICK

RUBIN WACHTEL BAUM & LEVIN

598 MADISON AVENUE

NEW YORK, N. Y. 10022

(212) PLAZA 9-2700

July 19, 1974

MAX J. RUBIN
COUNSEL

CABLE ADDRESS: RUBINBAUM NEWYORK

WASHINGTON OFFICE
100 CONNECTICUT AVENUE, N. W.
(202) 293-1350

CERTIFIED MAIL RETURN RECEIPT

Securities and Exchange Commission
Washington, D. C. 20549

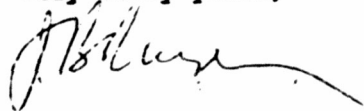
Re: NJB Prime Investors

Gentlemen:

On behalf of D-Z Investment Company, we enclose for filing eight copies of Amendment No.5 to its Information Statement on Schedule 13D Relating to Beneficial Ownership of Shares of Beneficial Interest in the above named registrant; one thereof has been executed and the remainder have been conformed.

We are concurrently mailing one executed copy each of the within Amendment to the registrant and to the American Stock Exchange.

Very truly yours,



JBR:ew

enclosures

cc: NJB Prime Investors - Certified Mail (enclosure)

cc: American Stock Exchange - Certified Mail (enclosure)

NJB PRIME ADVISORS
JUL 22 1974

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*Exhibit B Annexed to Supplemental Affidavit
of Bertram M. Kantor*

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

AMENDMENT NO. 5

to

SCHEDULE 13D

Pursuant to Section 13(d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z Investment Company
420 14th Street N. W.
Atlanta, Georgia 30318

Address copies of all communications to:

Joseph B. Russell, Esq.
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

Amending Items 3 and 5, and Schedule B.

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*Exhibit B Annexed to Supplemental Affidavit
of Bertram M. Kantor*

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this amendment, approximately \$1,023,305 has been expended by D-Z for the purchase of the 164,000 NJB Shares referred to in Item 5 below. Approximately \$542,245 thereof was paid out of D-Z's own funds, of which \$75,000 was advanced by Bruce R. Davis and \$500,000 was obtained in a private placement of its 6% promissory notes, due March 31, 1975, sold to the persons and in the amounts set forth in Schedule B annexed. The balance of the purchase cost was obtained by margin borrowings from Cantor, Fitzgerald & Co., Inc., Beverly Hills, California, and from Ladenburg, Thalmann & Co., New York, N. Y., in each case secured by pledge of the NJB Shares purchased on margin through such broker; an additional \$62,500 was borrowed from a bank and is secured by pledge of 25,000 NJB Shares which are not otherwise encumbered.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

Following the filing of the statement to which this amendment relates, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB Shares, other than purchases, as follows:


<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19 - July 15 (previously reported)	160,000
July 16	4,000*
TOTAL	<u>164,000</u>

* Purchased on American Stock Exchange.

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By 
Bruce R. Davis,
President

July 19, 1974

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*Exhibit B Annexed to Supplemental Affidavit
of Bertram M. Kantor*

SCHEDULE B

The purchasers of the 6% promissory notes referred to in

Item 3 hereof are as follows:

<u>NAME AND ADDRESS OF PURCHASER</u>	<u>PRINCIPAL AMOUNT</u>
Security Management Co., Inc. 420 Fourteenth St., N.W. Atlanta, Georgia 30318	\$ 50,000
Jerome Zimmerman 1260 Foster Street, N.W. Atlanta, Georgia	50,000
Bernard Kroll* 100 Colony Square Suite 2300 Atlanta, Georgia	100,000
Max Sophier 2575 Peachtree St., N. E. Atlanta, Georgia 30305	50,000
Harold Levow 1235 Mt. Paran Road, N. W. Atlanta, Georgia	50,000
Harold B. Levin, M. D. 1293 Peachtree St., N. E. Atlanta, Georgia 30309	50,000
Harvey Jacobson 3236 E. Wood Valley Rd., N. W. Atlanta, Georgia 30327	50,000
Seymour Weinberg Old Ivy Road, N. E. Atlanta, Georgia	50,000
Ronald D. Feinman 5310 London Drive, N. W. Atlanta, Georgia	50,000

* As nominee for a joint venture in which Mr. Kroll holds a 37.5% beneficial interest. The remaining interests are held by Morris Socoloff, 4615 Mt. Paran Parkway, N. W., Atlanta, Ga. (50%) and Mark W. Rottner, 5280 Mt. Vernon Parkway, N. W., Atlanta, Ga. (12.5%).

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EXHIBIT C--FORMAL COMMITMENT LETTER ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF BERTRAM M. KANTOR

FINANCIAL RESOURCES CORPORATION

827 MADISON AVENUE SUITE 1822
NEW YORK, N. Y. 10022
TEL. NO. (212) 371-2780

June 27, 1974

D-Z Investment Company
420 14th Street N. W.
Atlanta, Georgia 30318

Attention: Mr. Bruce R. Davis, President

Dear Mr. Davis:

You have requested on behalf of D-Z Investment Company (the "Company"), a loan from the undersigned ("FRC") of \$2,700,000 in connection with the proposed tender offer by the Company for 350,000 shares of beneficial interest of NJB Prime Investors ("NJB"), a Massachusetts business trust with offices at 950 Clifton Avenue, Clifton, New Jersey.

In response to your request, this letter is a commitment by FRC, subject to the conditions expressed herein, to provide the financing you have requested. The terms and conditions of our commitment which shall be set forth in loan, security and other agreements reasonably satisfactory to your counsel and ours, are as follows:

1. Amount of Loan: \$2,700,000
2. Term of Loan: The Loan shall be for a period of three years (36 months) commencing from the date of the funding of the loan.
3. Interest: Interest on the unpaid principal balance of the loan shall be at the rate of six and three quarters (6-3/4%) percentage points over the prime rate, established by the First National City Bank, New York, from time to time, or fifteen percent (15%) whichever is higher. Interest shall be charged and payable on a monthly basis.

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*Exhibit C Annexed to Supplemental Affidavit
of Bertram M. Kantor*

FINANCIAL RESOURCES CORPORATION 827 MADISON AVENUE NEW YORK, N.Y. 10022

D-Z Investment Company

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June 27, 1974

4. Repayment: The loan shall be repaid in the following manner:

<u>Close of</u>	<u>Percent of Outstanding Principal Balance</u>
Ninth month	Five (5%) percent
Twelfth month	Five (5%) percent
Fifteenth month	Ten (10%) percent
Eighteenth month	Ten (10%) percent
Twenty-first month	Ten (10%) percent
Twenty-fourth month	Ten (10%) percent
Twenty-seventh month	Twelve & 1/2 (12-1/2%) percent
Thirtieth month	Twelve & 1/2 (12-1/2%) percent
Thirty-third month	Twelve & 1/2 (12-1/2%) percent
Thirty-sixth month	Twelve & 1/2 (12-1/2%) percent

5. Prepayment Privilege: The Company shall have the right to prepay the loan in denominations of not less than fifty thousand dollars (\$50,000). In the event the loan is to be prepaid, then D-Z and/or its designees shall pay, in addition to interest otherwise due on the loan a prepayment penalty of two and one-half (2-1/2%) percent of the amount prepaid, if such prepayment is prior to the expiration of one year from the date of the loan. In the event of prepayment during the second year of the term of the loan, the prepayment penalty shall be one (1%) percent of the amount prepaid. In the event that the prepayment is made during the third year of the loan then no penalty shall be charged.

6. Security: The loan shall be a general obligation of the Company, secured by:

a) The guarantee of Security Management Co., Inc. ("SMC") of 420 14th Street, N.W., Atlanta, Georgia;

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*Exhibit C Annexed to Supplemental Affidavit
of Bertram M. Kantor*

FINANCIAL RESOURCES CORPORATION 827 MADISON AVENUE NEW YORK, N.Y. 10022


D-Z Investment Company

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June 27, 1974

b) The personal guarantee of
Bruce R. Davis;

c) To the extent permitted by
applicable provisions of Section 7
of the Securities Exchange Act of
1934 and the Rules and Regulations
of the Federal Reserve Board there-
under, in the written opinion of
counsel to both FRC and the Company,
but not otherwise, by shares of NUB
owned by the Company;

 d) If shares of NUB may not be pledged
as security, as provided in (c) above,
by real estate or other security having
a fair market value of not less than
\$5,400,000.

7. Commitment:

Not later than July 19, 1974, FRC
shall deliver to the Company its
written commitment to make the loan
contemplated hereby. Thereafter,
upon the execution of the agreements
contemplated hereby, FRC will deliver
to the Company an irrevocable letter
of credit, of an acceptable bank or
other equally acceptable instrument
of undertaking, pursuant to which the
Company may for a period of nine
months (6 months, subject to extension
of 90 days), call upon the letter of
credit for \$2,700,000 on two business
days' notice following completion of
a tender offer by the Company as
contemplated hereby.

8. Commitment Fee:

The Company has paid \$5,000 to FRC
on execution hereof, receipt of which
is hereby acknowledged, which shall
be for the time and expenses of FRC
and shall not be refundable even if
no commitment is made on or before





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*Exhibit C Annexed to Supplemental Affidavit
of Bertram M. Kantor*

FINANCIAL RESOURCES CORPORATION 827 MADISON AVENUE NEW YORK, N. Y. 10022

D-Z Investment Company

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June 27, 1974

8. Commitment Fee:
(continued)

July 19, 1974. Upon execution of definitive agreements and delivery of the bank letter of credit to the Company or other acceptable undertaking, as contemplated hereby, the Company shall pay to FRC an additional \$45,000, which shall be non-refundable, whether or not the Company makes the tender offer contemplated hereby, if the Company fails to borrow the \$2,700,000 to be committed hereunder within the nine months following delivery of the bank's Letter of Credit as contemplated herein. Forfeiture of said \$50,000 shall be the only remedy of FRC if the Company shall not make the borrowing contemplated hereby.

9. Loan Closing:

The loan shall close, on two business days' notice by the Company subsequent to expiration of the contemplated tender offer, upon payment by the bank to the Company of the proceeds of the letter of credit.

10. Loan Fee:

The Company shall pay FRC a loan fee equal to eight (8%) percent of the principal amount of the loan at the closing. The fifty thousand dollars (\$50,000) commitment fee paid to FRC shall be credited toward the eight (8%) percent loan fee. Thus the total due FRC from the Company at the closing shall be two hundred and sixteen thousand dollars (\$216,000) less fifty thousand dollars (\$50,000) for a total of one hundred and sixty-six thousand dollars (\$166,000).

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*Exhibit C Annexed to Supplemental Affidavit
of Bertram M. Kantor*

FINANCIAL RESOURCES CORPORATION 527 MADISON AVENUE NEW YORK, N. Y. 10022

D-Z Investment Company

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June 27, 1974

11. Expiration of Commitment: The Company shall have no obligation to make any tender offer. However, if no tender offer is made within 240 days following the delivery of said bank letter of credit to the Company, the commitment of FRC hereunder shall be null and void, with no refund of the \$50,000 commitment fee.
12. Company's Rights: No commitment or obligation of any kind has been made by or on behalf of the Company, SMC or Bruce R. Davis with respect to any course of action to be followed by any of them if control of NJB is obtained. Without limiting the generality of the foregoing, no commitment has been made, and FRC is not relying upon any expressed intention, to merge NJB with or into any other legal entity.
13. Required Documents: The Company shall furnish to FRC its audited financial statement as of May 31, 1974. SMC shall cause to be delivered to FRC its audited financial statements for the year ended December 31, 1974. SMC shall cause to be delivered to FRC its audited financial statements for the year ended December 31, 1973. SMC and Mr. Bruce Davis shall also furnish (or have furnished) other supporting documents reasonably requested by FRC. The audited financial statements shall be delivered to FRC within five (5) days of their receipt by SMC. In addition, during the life of the loan the Company and SMC shall each furnish FRC with quarterly signed financial statements and annual audited statements.

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*Exhibit C Annexed to Supplemental Affidavit
of Bertram M. Kantor*

FINANCIAL RESOURCES CORPORATION 827 MADISON AVENUE NEW YORK, N. Y. 10022

D-Z Investment Company

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June 27, 1974

14. **Personal Guarantee:** Mr. Bruce Davis has agreed to personally guarantee this loan. The net worth statement of Mr. Davis, dated as of November 1, 1973, heretofore delivered to FRC, is accurate as of that date to the best of his knowledge and belief, and the net worth shown thereby, on the basis of the fair market values as of November 1, 1973, is not less at the date hereof than as of November 1, 1973. During the life of the loan Mr. Davis shall make every reasonable attempt to maintain a minimum ratio of 1.24 times his net worth to the unpaid principal balance of the loan. He shall furnish FRC with quarterly personal financial statements during the life of the loan.
15. **Brokerage Indemnification:** The Company agrees to hold FRC harmless from any claim for brokerage commission of any broker or finder in connection with this transaction. SMC and Mr. Davis will guarantee such indemnification in the loan documents to be prepared.
16. **Assignment:** This Agreement may not be assigned by the Company without FRC's written consent.
17. **Additional Provisions:** The loan documents to be prepared will contain such other and further warrants, representations, restrictions, etc., as the parties hereto and their counsel may determine and agree upon.
18. **Fees and Expenses:** The Company shall pay its own legal fees and expenses in connection with

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*Exhibit C Annexed to Supplemental Affidavit
of Bertram M. Kantor*

FINANCIAL RESOURCES CORPORATION 827 MADISON AVENUE NEW YORK, N. Y. 10022

D-Z Investment Company

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June 27, 1974

18. Fees and Expenses:
(continued)

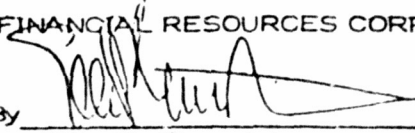
the loan and related matters contemplated
herein, as well as the reasonable legal
fees of legal counsel for FRC in connec-
tion with the loan contemplated hereby.

Please confirm your request and our understanding as aforesaid by
signing and returning to us a copy of this letter.

Very truly yours,

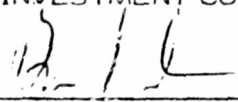
FINANCIAL RESOURCES CORPORATION

By


Ellis P. Eisenstein,
President


ACCEPTED AND AGREED:
D-Z INVESTMENT COMPANY

By


Bruce R. Davis,
President

ONLY COPY AVAILABLE

IN FULL PAYMENT OF THE FOLLOWING ACCOUNT		NUMBER	
DATE	AMOUNT		
		11557	
TOTAL OF INVOICES		DATE	1-777/260
LESS DISCOUNT		June 27	19 74
LESS		G	
TOTAL DEDUCTIONS		Financial Resources Corporation	
AMOUNT OF CHECK		\$5,000.00	
IF INCORRECT PLEASE RETURN RECEIPT NECESSARY		--Five Thousand and no/100--	
		DOLLARS	


STERLING NATIONAL BANK
 & TRUST COMPANY OF NEW YORK
 540 MADISON AVE., N.Y., N.Y. 10022

PAY TO THE ORDER OF *[Signature]*

⑆0260⑈0777⑆ 03-020058

A 221

EXHIBIT D--LETTER FROM DAVIS TO BECKER ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF BERTRAM M. KANTOR



SECURITY MANAGEMENT

March 15, 1974

Mr. Saul Becker
First Fidelity Realty Group, Ltd.
800 Peachtree Street, NE
Suite 501
Atlanta, Georgia 30308

RE: Tender for Beneficial Shares of a Realty Investment Trust

Dear Mr. Becker:

I appreciated your time and comments during our meeting on Tuesday relative to formulating a plan to tender for the shares of beneficial interest of a real estate investment trust. The following is an outline of my thinking and plans for the tender:

The REIT's are under terrific pressure today due to mounting problems with various loans in their portfolios. The accountants are scrutinizing the loans very carefully and requiring large reserves to be established which previously were not required. The establishment of the reserves has cut deeply into the earnings of the trusts. The public has become disenchanted and the stocks of many of the REIT's are selling at from 40% to 60% of their book value.

The entire concept of REIT's is not realistic in that an entity cannot continue to loan their money in high-yielding and high-risk loans, increase their earnings each period, and pay out 90% of what they earn. The more loans being made the more risk of loss and without proper reserves and retained earnings to fall back on, they will eventually run into trouble, which is what is happening today. In addition, the trust personnel are not

Let
TRUSTEE EXHIBIT 1/1 FOR IDENT.
7/15/74 L. M. BERMAN

Security Management Co., Inc. / 120 Fourteenth Street, N.W., Atlanta, Georgia 30303 (404) 527-7000

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*Exhibit D Annexed to Supplemental Affidavit
of Bertram M. Kantor*

Mr. Saul Becker
March 15, 1974
Page 2

capable of salvaging trouble loans without looking to outsiders. and since they have made their loans in so many different geographic areas, administration of the loans is a fantastic undertaking.

I have made a careful study of various REIT's which have a market value of between 40% to 60% of book value. In every instance, the holders of beneficial interest were a large group of people ranging in the thousands with no one owning more than 1% or 2% of the outstanding shares. In addition, the advisors to the trust, and for all practical matters the controlling interest of the trust, hold little or no shares of beneficial interest.

The advisors have made substantial fees for managing the assets of the trust and, in addition, have related mortgage companies which derive additional fees for placing mortgage loans with the trust. The advisors, in an attempt to maintain increased earnings, have leveraged the trust's equity and in 1973 got caught with increased interest costs as commercial prime rose. Also, in their desire to increase earnings, they became lax in their requirement as it relates to the borrowers and this, coupled with geographic problems, made proper loan administration difficult. To compound this, the increase in interest rate caught many developers unprepared and unable to make good on their loans as they matured. Due to the rapid growth of the industry, personnel became a major problem and the trusts were unable to staff properly. When all these factors occur, you arrive at the current troubled situation of the trusts.

I do feel that most loans, with proper administration, can be salvaged at par and with this in mind it is my opinion that if a successful tender could be made for the shares of beneficial interest, you would be buying dollars for 40% to 60% of the dollar.

I have chosen three trusts as candidates and once the necessary funds are arranged, one will be chosen. As I previously stated, each is selling at 40% to 60% of its book value and a tender at 120% to 130% of market value would still keep the price below 60% of book value. The total dollars needed would range between \$5 million and \$7 million.

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*Exhibit D Annexed to Supplemental Affidavit
of Bertram M. Kantor*

Mr. Saul Becker
March 15, 1974
Page 3

I propose that a surprise tender be made. Due to the substantial fees the advisor earns, he will most likely be unfriendly. The stock price of the trusts is about 40% to 60% of the original offering price and/o the market price of one year ago. The trusts are organized in Massachusetts, which allows any shareholder access to the stock records of the company. This enables us to have a listing by name, address, and percent of ownership for each shareholder.

I propose that our company will fund the first \$1 million needed. Our money will be used to absorb all front end expenses of the tender in the event of success or failure. The balance of the funds would be provided by the investors who would have a debt and equity position. The details of the arrangement would have to be negotiated.

Initially, we would tender for a minimum of 51% of the shares of beneficial interest. Absolute control of the trust would be in the hands of those owning 51% of the shares. We would also want to comply with the IRS rulings as they apply to ownership so as to not initially destroy the tax status of the trust. If we are successful in our tender, it would be my idea to allow the advisor to continue for some period of time so that problem loans could be worked out and if there was any lack of due diligence in the origination of the loan or its administration, that responsibility would be with the advisor. We would, of course, assist in helping to cure problem loans by using our expertise in the development field. Our company develops apartments and condominiums and presently manages in excess of 4,000 apartments.

At some point in time, we would cancel the advisory contract. All the advisory contracts are for a period of one year and can be canceled by the trust upon 60 days notice. We would install our people as the trustees of the trust and, in addition, form our own advisory company.

By maintaining the trust status, the servicing of the debt incurred in the acquisition of the trust can be accomplished via the trust's earnings which are passed through to the shareholders.

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*Exhibit D Annexed to Supplemental Affidavit
of Bertram M. Kantor*

Mr. Saul Becker
March 15, 1974
Page 4

The next step would be to gain voting control of 66-2/3% of the outstanding shares and vote to eliminate the trust type of ownership. It requires a 66-2/3% vote to convert the trust to a regular corporation. Once this is accomplished, I would envision seeking real estate loans with equity participation. In addition, I would use the corporation as a vehicle to tender for other trusts which meet the percentage criteria of market value to book value and have acceptable loan portfolios.

It is also my intention to merge our operating company into the corporation on a stock-for-stock basis. Prior to the merger, I would contribute our stock in the trust to the corporation so that when the merger is concluded, the stock and related debt would be assumed by the corporation. The corporation has sufficient value and assets to retire the original indebtedness.

The end result would be a public corporation with a strong equity position, good management, and a new direction. All of the foregoing can be accomplished with discounted dollars.

It is my opinion that this entire plan, if possible, should be put into motion as promptly as possible since the trusts are under the greatest pressure today and no one has yet come forward with this type of plan.

I think the above is a fairly complete outline of the procedures and of my thoughts. If there is any additional information or any clarification of the ideas needed, please contact me.

I would appreciate your advising me of your thoughts relating to this matter.

Yours very truly,

BRUCE R. DAVIS
Chairman of the Board

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1348 AVE. OF THE AMERICANS
NEW YORK, N. Y. 10016
(212) 541-0400

Mr. Bruce R. Davis
Chairman of the Board
Security Management Company
420 Fourteenth Street, N.W.
Atlanta, Georgia 30318

Dear Bruce:

Pursuant to our continuing negotiations regarding your acquisition program, the following will serve as our fee arrangements with you and/or your company.

1. If we assist you in arranging the financing required to complete a transaction, our compensation shall be 5% of the first million dollars, 4% of the second million dollars, 3% of the third million dollars, 2% of the fourth million dollars, 1% of the fifth million dollars, and 1% thereafter.

2. If we find an appropriate acquisition candidate, we shall look to separate compensation for such role based on the formula in number one above.

If the understanding meets with your approval, please initial a copy in the space provided below.

Sincerely,

William P. Miller
Senior Vice President

b7b

AGREED TO AND ACCEPTED BY:

Security Management Company

RECEIVED

APR 26 1974

SECURITY MANAGEMENT CO.

NEW YORK - HEVERLY HILLS

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 TRUSTEES EXHIBIT 23 FOR 12/20/2017
 1/23/2018

EXHIBIT F--REPORT ANNEXED TO SUPPLEMENTAL
AFFIDAVIT OF BERTRAM M. KANTOR*Bertram M. Kantor*
6-3-74

D-Z INVESTMENT SEEKS POSTPONMENT OF NJB MEETING

NEW YORK, JUNE 3 - D-Z INVESTMENT CO SAID IT HAS FILED SUIT IN FEDERAL DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK SEEKING TO POSTPONE THE ANNUAL MEETING OF NJB PRIME INVESTORS. D-Z IS NJB'S LARGEST SHAREHOLDER.

IN D-Z'S ACTION THE COURT ORDERED NJB'S MANAGEMENT TO SHOW CAUSE THIS FRIDAY WHY THE ANNUAL MEETING OF SHAREHOLDERS SHOULD NOT BE POSTPONED FROM JUNE 13.

D-Z INVESTMENT, CHARGES IN TODAY'S ACTION THAT PROXY MATERIAL PREPARED AND DISTRIBUTED BY NJNB MANAGEMENT IS FALSE AND MISLEADING, MISREPRESENTS 1974 FIRST QUARTER EARNINGS AND FINANCIAL CONDITION OF NJBB AND DOES NOT ADEQUATELY DISCLOSE THE EXTENT OF CERTAIN CONFLICT OF INTEREST AND SELF DEALINGS OR THE ADVERSE EFFECT OF THESE DEALINGS ON NJB.

THE ACTION FURTHER CLAIMS THAT OTHER MATERIAL FACTS ARE MISREPRESENTED AND THAT THE PROXY MATERIALS CONCEAL THE GROSS NEGLIGENCE OF THE TRUSTEES IN FAILING TO PROTECT THE TRUST'S ASSETS.

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EXHIBIT G--REPORT ANNEXED TO SUPPLEMENTAL
AFFIDAVIT OF BERTRAM M. KANTOR

--COURT REJECTS D-Z INVESTMENT BID TO STAY
NJB PRIME INVESTORS A NUAL MEETING

N Y -DJ- A THREE JUDGE PANEL IN THE
SECOND CIRCUIT FEDERAL COURT OF
APPEALS HERE DENIED AN APPLICATION BY
D-Z INVESTMENT CO TO STAY THE HOLDING
OF THE A NUAL MEETING OF NJB PRIME INVESTORS
IN BOSTON TOMORROW.

D-Z APPLIED FOR THE STAY AFTER A
FEDERAL DISTRICT COURT JUDGE YESTERDAY
REFUSED TO ENJOIN THE MEETING.

NJB A REAL ESTATE INVESTMENT TRUST
SAID THE MEETING WOULD BE HELD AS SCHEDULED
AT 10 00 AM TOMORROW AT THE BOSTON
SHERATON HOTEL.

-0- 11 38 AM EDT JUNE 12-74

--COURT REJECTS D-Z INVESTMENT BID TO STAY
NJB PRIME INVESTORS. A NUAL MEETING

N Y -DJ- A THREE JUDGE PANEL IN THE
SECOND CIRCUIT FEDERAL COURT OF
APPEALS HERE D NIED AN APPLICATION BY
D-Z INVESTMENT CO TO STAY THE HOLDING
OF THE A NUAL MEETING OF NJB PRIME INVESTORS
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AT 10 00 AM TOMORROW AT THE BOSTON
SHERATON HOTEL.

-0- 11 38 AM EDT JUNE 12-74

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EXHIBIT H--REPORT ANNEXED TO SUPPLEMENTAL
AFFIDAVIT OF BERTRAM M. KANTOR

THE WALL STREET JOURNAL 6/12/74

*D-Z Motion to Postpone
NJB Meeting Is Denied**By a WALL STREET JOURNAL Staff Reporter*

NEW YORK—A federal judge here denied a motion of NJB Prime Investors' largest investor to postpone NJB's annual meeting, set for tomorrow in Boston.

D-Z Investment Co., a private Atlanta-based concern that since April 19 acquired some 107,500, or about 8.5%, of NJB's outstanding shares, sued in federal court here earlier this month to postpone the meeting. It was seeking time to comply with Securities and Exchange Commission rules for opposition proxy materials, which would be sent to NJB holders.

D-Z spokesmen couldn't be reached for comment, thus it's unclear whether they will seek today to appeal that decision.

NJB is a real estate investment trust. D-Z is owned by Atlanta real estate interests.

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EXHIBIT I--REPORT ANNEXED TO SUPPLEMENTAL
AFFIDAVIT OF BERTRAM M. KANTOR

The Boston Globe

FRIDAY MORNING, JUNE 11, 1971

NJB gets
court help
on annualBy Laurence Collins
Globe Staff

The management of NJB Prime Investors, a real estate investment trust, had the best of two legalistic worlds at yesterday's annual stockholder meeting in the Sheraton Boston Hotel.

First, because the stockholder meeting was actually held. Another outfit, D-Z Investment Co., Wednesday failed in a court bid to have the meeting postponed.

Secondly, because other court action of D-Z Investment is still pending, the chairman of NJB Prime Investors, Robert E. Holloway, was able to avoid most of the questions directed to him by representatives of D-Z Investment because it would be "inappropriate" for him to comment on matters still in litigation.

In addition, NJB officers were flashing copies of Wednesday's court ruling, which contained a number of unflattering references to D-Z In-

vestment, all of them helpfully underscored in dark crayon. Stockholders were told that they could receive a copy of the ruling if they left their names and addresses.

D-Z Investment Co., according to the court document, owns 9 percent of the outstanding shares of NJB and was organized only recently with the sole intention of securing control of NJB.

NJB, like many real estate investment trusts, has been having problems with many of the loans it has made to developers and contractors.

As of May 1, more than \$24 million of NJB loans, or about 23 percent of its total loan portfolio, were not accruing interest.

Included in that figure is some \$13.8 million in loans to companies operated by Walter J. Kassaba, a

NJB, Page 27

NJB gets court help on holding annual meeting

★ NJB
Continued from Page 24

developer who last December filed under Chapter 11 of the Bankruptcy Act. The loans to Kassaba alone represent approximately 16

amount when the deal was completed.

Both Taub and Holloway emphasized that NJB has yet to foreclose on a single project and that the trust's bad-debt reserve was "completely adequate" for any pos-

sible of D-Z Investment's charges, most of which are related to its interest accrual problems.

D-Z Investment's suit maintains that NJB eventually will suffer losses based on the amount of the overdue loans, and that the trust has

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EXHIBIT J--REPORT ANNEXED TO SUPPLEMENTAL
AFFIDAVIT OF BERTRAM M. KANTOR

THE WALL STREET JOURNAL, Tuesday, June 4, 1974

D-Z Investment Asks
Court to Postpone
NJB Annual Meeting

By a WALL STREET JOURNAL Staff Reporter

NEW YORK--D-Z Investment Co., a private Atlanta-based concern that has been buying up shares of NJB Prime Investors, sued in federal court here to postpone the annual meeting of NJB, a real estate investment trust based in Chilton, N.J.

The court ordered NJB's management to show cause Friday why the scheduled June 13 meeting shouldn't be postponed.

Since April 19, D-Z Investment has acquired some 107,599, or about 8.5%, of the trust's outstanding shares, which have traded at substantially below stated book value. The legal papers show that D-Z is owned by Atlanta real estate interests: Jerome Zimmerman, president of EML Services Inc., an apartment management company, and Security Management Co., a real estate development and management company. Bruce R. Davis, chairman of Security Management, is president of D-Z.

Proxy Materials

If the June 13 shareholder meeting is postponed, D-Z would have time to comply with Securities and Exchange Commission rules for opposition proxy materials, which would be sent to NJB Prime Investor shareholders. In a related action two weeks ago, D-Z won a temporary court order in superior court, Boston, restraining NJB from sending out materials for the annual meeting until it made the shareholder list available to D-Z.

The suit filed by D-Z in New York yesterday charged that proxy material prepared and distributed by NJB's management is "false and misleading, misrepresents 1974 first quarter earnings and financial condition of NJB and doesn't adequately disclose the extent of certain conflicts of interest and self dealings or the adverse effects of these self dealings on NJB."

Listed among charges of self-dealing was that NJB investments in motor lodge and restaurant properties on which Prime Motor Inns is borrower or lessee increased from \$4.6 million, or 8.8% of NJB's assets on Nov. 30, 1972, to \$28.6 million, or 30.4% of NJB's assets, a year later.

Joint Venture

The advisory company to NJB Prime Investors is a joint venture of Greater Jersey Bancorp, the parent of New Jersey Bank (N.J.), and Prime Motor Inns Inc.

A spokesman for NJB Prime Investors said yesterday he couldn't comment on the suit because he hadn't yet seen the papers.

In its filings with the SEC, D-Z said its intention in purchasing NJB shares is "to acquire a sufficient ownership interest in NJB to influence management decisions and, ultimately, to determine the management and policies of NJB." It also said that should it obtain control of NJB, subject to a study, it would consider the possible disposition of certain NJB assets and changes in lending policies. It said it might then recommend discontinuing NJB's status as a real estate investment trust, merger with D-Z or Security Management or acquisition of other real estate investment trusts.

EXHIBIT K--SUMMARY SHAREHOLDER LIST ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF BERTRAM M. KANTOR

N.J.B. Prime Investors
Shareholders as at May 10, 1974
Holders of More Than 10,000 Shares

Customer #	Customer Name & Address	Shares
17	Cede & Co. NY 10011 Box 20 Bowling Green Street New York, New York 10004	274,976
20	Comtru & Co. Grand at 12th Street Kansas City, Mo. 64106	22,130
23	Cudd & Co. Chase Box 1508 Church Street New York, New York 10008	26,947
31	C A England & Comp. Chemical Box 1508 Church Street New York, New York 10008	10,012
47	Houvis & Comp. 326 Union Street Nashville, Tn. 37219	19,436
50	Jay & Company Box 1102 Beverly Hills, California 90213	61,000
81	Tranco & Co. Box 693 Kansas City, Mo. 64141	41,219
121	Alico Management Co. P. O. Box 1849 Waco, Texas 76703	10,000
40	Gerlach & Co. 20 Exchange Place New York, New York 10015	92,500

W.S. (circled)
CNA (circled)

546,150 (underlined)

DEPT
TRUSTS EXHIBIT 3 FOR IDENT.
7/24/74 J. H. BERTRAM

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EXHIBIT L--SUMMARY SHAREHOLDER LIST ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF BERTRAM M. KANTOR

H.B. Prime Investors
Shareholders as at May 1, 1974
Holders of 1,000 to 10,000 Shares

(7)

ORDER #	Customer Name & Address	# of Shares
1 <i>HY Van Nieuwen</i>	Alten & Company <i>North Street</i> 15th & New York Avenue <i>7th St</i> Washington D.C. 20005 <i>200 659-5400</i>	6,400
2 <i>noteville</i>	Atru & Company <i>Colonial Bldg</i> P.O. Box 2210 <i>203-257-5251</i> Waterbury Ct. 06720 <i>6/14/74 Toni (gil) not more info</i>	2,180
3	Atwell & Company <i>U.S. Trust</i> Box 456 Wall Street New York, New York 10005	1,100
5	Bache & Co. 100 Gold Street New York, New York 10038	3,329
6 <i>done</i> <i>seller</i> <i>L's</i>	Baldwin & Co. <i>F.N.B. Monty</i> Box 51 <i>205-700-5711</i> Montgomery, Al. 36101 <i>Colonial</i> <i>6/14</i>	5,000
7	Barnett & Co. <i>B.T.</i> Box 704 Church Street New York, New York 10006	2,380
8	Bauer & Co. <i>Shirley T. Trust</i> Box 15003 New York, New York 10049	1,000
10	Beck & Co. <i>John J. Ryan & Co.</i> 744 Broad Place <i>Avil 622 3,000</i> Newark, New Jersey 07102	2,048
13	CBWL Hayden Stone Inc 17 Battery Park Plaza New York, New York 10004	3,390
16	Calhoun & Co. <i>mty N.B.</i> Box 1319 <i>313-200-4588</i> Detroit, Mi. 48321 <i>6/14</i> <i>did not get response</i>	5,500 <i>6/14</i>
34	Firnat & Co. <i>F.N.B.</i> Box 2669 Phoenix, Arz. 85002	1,000
36	First Regional Sec. Inc. <i>300-539 3000</i> 7 East Redwood Street <i>Leppman</i> Baltimore, Md. 21203	1,047
39	Friendly Company <i>NDNA</i> 60 Hempstead Avenue West Hempstead, New York 11552 <i>Pat. Attorney</i> <i>516-481-9000</i> <i>6/14</i> <i>6/14</i> <i>6/14</i> <i>6/14</i> <i>6/14</i> <i>6/14</i>	2,500
31	Kane & Company <i>Chase</i> 1 Chase Manhattan Plaza New York, New York 10015	2,000
35 <i>613-204-7771</i> <i>Anthony A. Wether</i> <i>7/14</i> <i>Pilcher</i>	Meba & Co. <i>B.N. New Haven</i> 27 N State Street <i>6/14/74</i> <i>6/14</i> Concord, N.H. 03301 <i>6/14</i> <i>could prove more more</i>	9,761
37	Merrill Lynch 1 Liberty Plaza New York, New York 10006	3,232
38	Milslate Co. <i>State St. 9th Fl</i> Box 22212 <i>513-659-3300</i> Milwaukee, Wis. 53222	2,200

Exhibit L Annexed to Supplemental Affidavit
of Bertram M. Kantor

Index	Full Name & Address	No. of Shares
60	Jas H. Oliphant & Co., Inc. 61 Broadway New York, New York 10006	3,000
61	J. C. ^{San} & Comp. <i>Chen Beach</i> Box 1268 Church St. New York New York 10003	1,739
63	Paco <i>See Pacific</i> 411 S Main Street Los Angeles Ca, 90013	3,416
68	Pershing & Co Inc. 120 Broadway New York, New York 10005	1,706
72	Shearson, Hammil & Co. 14 Wall Street New York, New York 10005	1,538
88	H.A. Whitten & Co. <i>Chen Beach</i> Box 1368 Church Street New York, New York 10008	1,000
90	Zereb <i>US NB on 503-225-4470</i> Box 3168 Portland, Or. 97208 <i>from building Ellen Wang</i>	1,000 <i>all</i>
91	A.R. Investment <i>See 921-930</i> 345 Underhill Blvd Soyosett, New York 11791 <i>multiple</i>	1,400 <i>all new out for transfer near notes</i>
95	E. Farington Abbott Jr. 81 Main Street Auburn, Me. 04210	1,139
112	Goodwin Adrian 129 Market Street Paterson, New Jersey 07505	1,200
185	Bacal Trust Dept <i>See 921-930</i> Box 3121 Portland, Or. 97208 <i>1/17 See case 2455</i>	3,000 <i>1/17</i>
219	Alfred S. Barnett 153 Ocean Avenue Daytona Beach, Fl. 32018	1,000
276	Benjamin L. Bendit 744 Broad Street Newark, New Jersey 07102	1,000
289	Bergen Rockland Retirement 180 Old Hook Road Westwood, New Jersey 07675	1,000
308	Sydney Berman C/O Berm Studios Inc. 404 Industrial Park Dr. Yeadon, Pa. 19050	1,000 + <i>1/17</i>
330	Austin D. Bevier 12382 Janet Circle Garden Grove, Ca 92641	1,000
360	Richard J. Brooston 2855 Palm Avenue Pompanu Beach, Fl. 33060	1,520
365	Samuel Bluestein <i>State Sp. Bureau</i> 384 Lex Avenue Clifton, N.J. 07011	1,500

*John B. Boring 922
409 Carnegie 144
Wichell 11/14*

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Exhibit L Annexed to Supplemental Affidavit
of Bertram M. Kantor

Customer No.	Customer Name & Address	Amount
383	Edward H. Borneman 87 Great Hills Rd. Short Hills, N.J. 07073	1,000
421	Bruver & Co. P.O. Box 1426 New York, N.Y. 10008	1,000
559	Harriett S. Chase 33 Camelot Rd. Yarmouth Port, Ma. 02677	1,000
558	Donald C. Chase 33 Camelot Rd. Yarmouth Port, Ma. 02677	1,000
628	Catherine K. Collins 13689 No 108 St. Sun City, 85351	2,000
694	Robert Alan Daniels 927 Sciolo Dr Franklin Lakes, 07417	1,000
746	George W. Deyo Baxter Lane Milford Ct. 06460	17.00
747	Mary A. Deyo Baxter Lane Milford, Ct. 06460	1,400
787	Harry Drocker 80 Deborah Dr. Newton Center, Ma. 02159	6,700
790	Sophie Drooker 39 West St. Randolph, Ma. 02368	1,500
809	Hyman Dushman 43 Nancy Lane Brockton, Ma. 02403	1,200
813	JNB Comp. P.O. Box 90 Jacksonville, Fl. 32201	1,200
848	Ena Ellis 35 South Rd. Elmoringdale, N.J. 07403	1,500
855	Morton Engel 6405 Leonardo St. Coral Gables, Fl. 33134	1,000
931	Carl H. Ficke & Savilla 20 Upper Cross Rd. Saddle River, N.J. 07662	
980	Jacob S. Freedman 3100 Palm Ave. Pompano Beach, Fl. 33060	
995	Constance R. Friedman 2824 NE 26 Court Ft. Lauderdale, Fl. 33306	
1032	Frederic H. Gaskell 1 Bway. New York, N.Y. 10004	1,000

Index	Name	Address	City	State	Zip	Amount
1017	Robert L. Hunt	1/2 C10A	Summit	N.Y.	07901	1,000
1079	Sammuel Ginzberg	NR 118502	Wyncote	Pa.	19095	1,000
1078	Sidney L. Gimbel	One N. LaSalle St.	Chicago	Ill.	60602	1,000
1103	Cynthia Goldman	1 Highland Glen Dr.	Randolph	Ma.	02369	2,000
1126	Goud Investors Trust	245 Great Neck	N.Y.	07505		1,000
1140	Greater Jersey Mortgage	657 Main Ave.	Passaic	N.J.	07055	1,000
1208	Carl V. Hansen & Elfrieda Hansen	49 Auburn Rd.	Whitford	Conn.	06119	1,000
1213	Russel Harmen	3028 Tyrone Lane	Sarasota	Fl.	33580	1,000
1271	Bruno Herman & Esther	24 West Parkway	Clifton	N.J.	07015	1,500
1332	Hazel A. Holland	Shoreland Dr.	Madison	Conn.	06443	1,000
1358	William Hummel	C/O Trust Dept.	First New Haven National Bank			1,400
1374	JNB Comp. National Bank	P.O. Box 90	Jacksonville	Fl.	32201	5,300
1413	Johanson Mfg. Co.	Box 329	Boonton	N.J.	07005	4,880
1417	Herman T. Johnson	45 Long Wood Ave.	Brookline	Ma.	02146	1,400
1494	Joe Kendall	90 Corona NBR	Denver	Co.	80218	1,000
1539	Aaron Koenig	557 Central Ave.	Cedarhurst	N.Y.	11516	3,523
1551	Phillip C. Kopitsky	10359 Corbel Lane	St. Louis	Mo.	63141	1,000
1139	Greater Jersey Bancorp	129 Market St.	Patterson	N.J.	07055	5,120

Rick. Quasmon: 900
1461 SE 4th 622
Deerfield Beach Fl

geben 724 21
Jahren 1571

Exhibit L Annexed to Supplemental Affidavit
of Bertram M. Kantor

Customer No.	Customer Name & Address	# OF SMO
1540	Emil Koenig 80-10 West Drive Harbor Isle, Miami Beach, Fl. 33441	1,232
1664	X Alack Levine vol-779-5116 167 Mineral Springs Ave. Passaic, N.J. 07055	1,444 976
1670	Helen Levine vol-? 100 L. 38 St. Patterson, N.J.	1,050 800
1708	Francis Litinsky & Rose vol-7- 87 Risley Rd. Chestnut Hill, Ma. 02167	4,130 232-1697
1709	Eleanor Little Clapboard Hill Rd. Guilford, Ct. 06437	1,100
1740	Gene E Lumpkin P.O. Box 494 Cameron, Tx. 76520	1,000 500 500
1765	X Allan A Maki vol-327-1355 152 Deer Trail No. Ramsey, N.J. 07446	1,800
1789	Market Main & Co. P.O. Box 1311 Warren, Oh. 44482	2,875 vol-399-8311 note C removed p. Do Not call. Forward long, ok
1813	Albert A Mason 1009 N. Beverly Dr. Beverly Hills, Calif. 90210	1,952
1826	Rives Mathews Southern Arizona bond P.O. Box 2921 Phoenix, Az. 85036	1,000 ed: J. C. Bonnette
1948	Jorge Garcia Montes 446 Gerona Ave. Coral Gables, Fl. 33146	1,317
1840	Martin E. McCarthy Jr. RR 7 Box 531 Fairmont, W.V. 26554	1,000
1871	X Helen Gower Means 265 Kings Highway No. Haven, Ct. 06473	1,400
1872	X K. Glenn Means 265 Kings Highway No. Haven Ct. 06573	1,400
1954	Henry Morris & Pearl A. 321 Elm Ave. No. Hill, Pa. 19038	1,000
1961	Marvin Mosberg 303 Gramercy Place Glenrock, N.J. 07452	1,000
2036	Northwestern Construction Co. 195 Main St. Metuchen, N.J. 08840	3,660 vol-541-4369 4/17 L. Kantor
2042	Lawrence J. O'Brien 657 Main Ave. Passaic, N.J. 07055	1,600

11/11/67 11/11/67 11/11/67 11/11/67 11/11/67

Exhibit L Annexed to Supplemental Affidavit
of Bertram M. Kantor

2007	Joseph W. Kantor C/O Auto City P.O. Box 68 East Boston, Ma. 02128	
2167	Harold Porter Jr. 470 Clifton Ave. Clifton, N.J. 07010	vol-276-470 X 5,000
2170	Henry Posthumus & Eleanor A-L Ranch, Union Valley Road Newfoundland, N.J. 07435	1,000
2181	Prime Equities Inc. Attn.: Peter Simon 1030 Clifton Ave. Clifton, New Jersey 07013	5,000 X
2230	Kurt P. Reimann 1880 So. Ocean Blvd. Lantana, Fl. 33460	1,000
2234	Orene L. Remonko & Pierina 558 Paramus Rd. Paramus, N.J. 07652	1,000
2249	Robert Riethheimer P.O. Box 3547 Ft. Lauderdale, Fl. 33316	1,000
2315	Adele Rothchild 900 N. Lake Shore Dr. Chicago, Ill. 60611	1,750
2335	Phillip T. Ruegger Jr. 23 Rayle Court Metuchen, N.J. 08840	1,220
2408	Albert R. Schneider 137 Rivera Dr. East Lindenhurst, N.Y. 11757	1,100
2417	Peter Schotanus 16-37 Pameles Ave. Fair Lawn, N.J. 07410	1,000
2430	Charles Schwartz 90 Greenwood St. Newton Ctr., Ma. 02159	1,000
2463	Barnet Shapiro 22 Grasmere Road Needham, Ma. 02194	1,000
2466	Hyman Shapiro 5 Wadsworth Terrace Cranford, N.J. 07016	vol-276-0133 3,200 4/4
2467	Mildred Shapiro 5 Wadsworth Terrace Cranford, N.J. 07016	3,200 4/5
2492	Marcel May Sherwood 8 Dater Lane Saddle River, N.J. 07458	2,000
2518	Bessie Silverman 46 Birchwood Road Randolph, Ma. 02368	1,000
2529	Mildred K. Simon 33 Baseline Rd. Clifton, N.J. 07012	1,000 X

Exhibit L Annexed to Supplemental Affidavit
of Bertram M. Kantor

2579	MILLIE E. Solomon 370 Fifth Ave. Room 5622 New York, N.Y. 10005	0X5 0031 4/17	3,000
2596	Jack Seebrenik 99 Frederick St. New Haven, Ct. 06515	vol-389-0000 4/16/74	1,100
2605	P. Milton Staub 200 Canterbury Rd. Westfield, N.J. 07090	vol-233-6071 4/18/74	1,220
2642	Leon S. Stone & Ruth H. Stone JT Ten 100 Bedford Ave. Hamden, Ct. 06517	vol-248-1173 4/18/74	2,050
2730	David W. Traub 20 Crumite Rd. Lafayetteville, N.Y. 12211	vol-518-434-6873 4/18/74	1,976
2785	Helen P. Vermilyea 100 Springlake Run Silver Springs Shores Ocala, Fl. 32670		1,000
2799	Gladys H. VonHacht 122 Knobb Hill Road Milford, Ct. 06460	vol-874-5774 4/18/74	2,050 100
2837	Barbara E. Waters P.O. Box 295 Forked River, N.J. 08731		1,480
2840	HC Wear 1400 N. Woodlawn, Wichita, Ks. 67208		1,250
2855	Jack & Ruth Weisbord JT Ten 2751 Palm Aire Drive Pompano Beach, Fl. 33060		1,292 100
2891	Dorothea B. White 72 Hilltop Terr. Redbank, N.J. 07701	vol-844-0118	1,488
2892	George C. White 72 Hilltop Terr. Redbank, N.J. 07701		2,388
2894	Stephen A. White C/O White Furn. Co. Mebane, N.C. 27302	914-563-1417 4/18/74	2,300
2895	Summer T. White 23 Union Ave. Milton, Ma. 02187		1,500
2900	Harry G. Withers Jr. 26 Janet Dr. New Haven, Ct. 06473	vol-196-1964 4/18/74	2,100 100
2930	Marsha N. Winkler & Barbara Jean Winkler J/T South St. Rockport, Ma. 01966		1,106
3014	Edward Waitzer 420 Glenaciran Ave. Toronto, Canada		1,000

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E. Plummer & Y

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7960

AFFIDAVIT OF BRUCE R. DAVIS IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
D-Z INVESTMENT COMPANY, :

Plaintiff, :

-against- :

ROBERT E. HOLLOWAY, MELVIN S. TAUB, :
MAURICE J. BRICK, PETER E. SIMON, :
NORMAN BRASSLER, CHARLES GILLER, :
HERBERT E. HARPER, DR. GORDON MCKINLEY, :
JAMES R. MOSELEY, III, JACK G. TAYLOR, :
DALLAS S. TOWNSEND, JR. and NJB PRIME :
INVESTORS, :

74 Civ. 2379
(I.B.W.)

Defendants, :

-and- :

SECURITY MANAGEMENT CO., INC., CANTOR, :
FITZGERALD & CO., INC., BRUCE R. DAVIS, :
JEROME ZIMMEPMAN, RALPH M. BECKER, SAUL :
BECKER, BERNARD KROLL, MAX SOPHIER, HAROLD :
LEVOW, HAROLD B. LEVIN, HARVEY JACOBSON, :
SEYMOUR WEINBERG and RONALD D. FEINMAN, :

AFFIDAVIT OF
BRUCE R. DAVIS
IN OPPOSITION
TO INDIVIDUAL
DEFENDANTS'
MOTION FOR A
PRELIMINARY
INJUNCTION

Additional Defendants
to Counterclaims. :

-----X
STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

BRUCE R. DAVIS, being duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of
D-Z Investment Company ("D-Z"), the plaintiff herein. I submit
this affidavit in opposition to the motion for a preliminary in-
junction made by the individual defendants who are the trustees

ONLY COPY AVAILABLE

(the "Trustees") of NJB Prime Investors ("NJB" or the "Trust"), a Massachusetts business trust with transferable shares traded on the American Stock Exchange which purports to qualify as a Real Estate Investment Trust ("REIT").

2. I am also a certified public accountant, the majority stockholder in, and Chairman of the Board and Chief Executive Officer of, Security Management Co., Inc. ("Security"), a Georgia corporation which owns 50% of the outstanding stock of D-Z and a \$50,000 unsecured 6% promissory note of D-Z. Security has 27 shareholders of record whose names and ownership percentages are set forth in Exhibit A hereto. In addition to its interest in D-Z, Security is actively engaged in the construction and development of residential housing, commercial properties, and the management of 3,200 units of residential housing.

3. I have carefully studied the affidavits of Bertram M. Kantor, Esq., dated July 19, 1974 and August 2, 1974 filed in support of the instant motion*. My purpose in this affidavit is to refute by facts known to me the gross and deliberate distortions, inaccuracies and half-truths set forth in the Kantor Affidavits and on which defendant Trustees have relied in this contrived and extravagant exercise to defeat D-Z from achieving its expressed objective, as set forth in Item 4 of D-Z's Schedule 13D

* Kantor's affidavit of July 19, 1974, is referred to as the "Kantor Aff."; his affidavit of August 2, 1974, is referred to as the "Kantor Supp. Aff."; and said affidavits are sometimes herein collectively referred to as the "Kantor Affidavits".

Affidavit of Bruce R. Davis

dated May 3, 1974 "to acquire a sufficient ownership interest in NJB to influence management decisions and, ultimately, to determine the management and policies of NJB".*

4. D-Z owns 166,000 shares of beneficial interest of NJB, or approximately 13% of the 1,276,053 shares presently issued and outstanding. According to NJB's Proxy Statement dated May 20, 1974, the moving defendants collectively own only 1,038 shares of NJB and the aggregate share ownership of those defendants even when increased by shares owned by entities with which they are affiliated amounts to only 7,616 shares. Unlike the defendants, D-Z has a vital and direct economic interest in the value of NJB shares and in insuring that the affairs of NJB are conducted in a manner which will enhance the value of NJB shares. Defendants, on the other hand, have a vital and direct economic interest only in retaining their lush positions and in seeing that no one acquires a sufficient stock interest to cause their ouster.

5. It is no small wonder that these defendants who have enjoyed the perquisites, sinecures and emoluments which flow from their positions as "trustees" of NJB and whose economic interest

* A true and complete copy of D-Z's Schedule 13D with all schedules thereto together with all six subsequent amendments is annexed as Exhibit B. D-Z's Schedule 13D contains as an exhibit thereto a letter agreement with Cantor, Fitzgerald & Co., Inc., ("CF") dated April 25, 1974 pursuant to which, among other things, CF agreed to render financial services to D-Z, as assignee of Security, in connection with D-Z's efforts to obtain control of NJB. This letter agreement with CF has been mysteriously deleted from the version of D-Z's Schedule 13D annexed to the Kantor affidavit of July 19.

in the value of NJB shares is de minimis have brought on this motion as part of a "spare no expense" campaign (so long as such expenses are paid out of NJB's treasury) to perpetuate their self-dealing stewardship. The endless barrage of characterization and innuendo in the Kantor Affidavits, which purport to vindicate the securities laws of the United States and to champion the cause of D-Z's 6% noteholders (whom, amazingly, defendants are suing in this very litigation) are but mere camouflage for the only objective of the defendants -- retention of their control of NJB.

6. Kantor's "Summary of Facts" (which continues for some six and one-half pages) is an odyssey through plans and intentions of various parties which were discarded long before the filing of D-Z's Schedule 13D. Moreover, he has distorted statements by the use of out of context quotations, and has injected a host of arguments which, I submit, are not relevant to the primary issue before this Court. That issue is simply whether D-Z, which has never made a tender offer for shares of NJB, can nevertheless be charged with violations of laws which relate only to tender offers.

A. D-Z's Schedule 13D is True and Complete.

7. I am fully familiar with each of the statements contained in D-Z's Schedule 13D. As I stated at my deposition, this document was prepared by my counsel after frequent consultation with me, and Jerome Zimmerman ("Zimmerman"), a vice president and

50% stockholder of D-Z, as well as with D-Z's Atlanta counsel (Davis-328)*. The information contained in D-Z's Schedule 13D fully, accurately and candidly sets forth the facts which I was advised were required to be included in response to Items 1 through 7 of such Schedule. It was obviously not my intention to withhold or misrepresent any facts requested by the specific items of the Schedule, as Kantor has charged (Kantor Aff., ¶21). Nor could there even be any sinister motive to withhold, distort or misrepresent the facts since the Schedule was not filed in connection with any tender offer in which shareholders were being induced to sell their shares but was merely an informational filing required by virtue of D-Z having acquired a 5% beneficial interest in NJB. We were not seeking to mislead potential sellers with a false selling document. We were simply responding to specific questions.

8. Kantor charges that D-Z's Schedule 13D is false because it failed to disclose that Zimmerman and I, together with Cantor, Fitzgerald & Co., Inc. ("CF") had by April, 1974 "formulated a specific, carefully worked-out program ... to obtain control of NJB" (Kantor Aff., ¶19(1)). Such assertion is false because, no such "specific, carefully worked out program" existed by April, 1974 or at anytime thereafter. If by his assertion Kantor is referring to a proposed joint effort between me and CNA

* "Davis" followed by a number refers to a page of the transcript of your deponent's deposition; "Zimmerman" followed by a number refers to a page of the transcript of deposition testimony of Jerome Zimmerman; similar references are used throughout when referring to depositions of other witnesses.

Affidavit of Bruce R. Davis

Financial Corporation ("CNA") to tender for shares of NJB, of which the Barry Silverstein letter (Kantor Aff., Ex. 1) was part and parcel, such joint effort was decisively abandoned and terminated in its entirety on April 12, 1974. (Davis-70, 73-75; Orbe-183A-184; Zimmerman-40). It was a program that had been completely cast aside. These facts were brought out at length in my extensive deposition testimony on this subject (Davis-63-75). Indeed, even Kantor acknowledges that the proposed joint effort was abandoned by April 1974 (Kantor Aff., ¶12). On May 3, 1974, the date D-Z's Schedule 13D was filed, the proposed joint effort with CNA and/or Mr. Silverstein had absolutely no vitality. Despite knowledge of these facts, Kantor has the temerity to assert that the omission of such information renders D-Z's Schedule 13D false.

9. In a similar irrelevancy, Kantor refers to a letter dated March 19, 1974 from Orbe of CF to one of the defendants, Norman Brassler, a Trustee of NJB, and the Chairman of the Board of New Jersey Bank, N.A. He states that the Orbe letter discloses at an early date the intent of CF's undisclosed client to obtain 51% control of NJB -- (Kantor Aff., ¶11 and Ex. B). Yet as Kantor acknowledges, this inquiry was rebuffed by NJB more than two months prior to the filing of D-Z's Schedule 13D. More importantly, neither I, at the time of Orbe's letter to Brassler, nor D-Z, at any time subsequent to its incorporation, had the funds available with which to acquire 51% of the outstanding shares of NJB by

tender offer or otherwise. Accordingly, a reference to such letter in the Schedule 13D would not only have been irrelevant, but misleading as well. It would have implied that D-Z had the resources to purchase 51% of NJB's shares when such was not the case.

10. Kantor states that in April, 1974, D-Z determined to achieve its objective of acquiring control of NJB by purchasing approximately 300,000 shares of NJB (Kantor Aff., ¶19(2)). Kantor is so eager to find "omissions" in the Schedule that he apparently claims D-Z should not only have stated an intent to acquire 51% of NJB's shares (see ¶9, supra) - i.e., approximately 640,000 shares, but also an intent to acquire 300,000 shares. Thus, Kantor would have D-Z state in its Schedule 13D that it was intending to acquire 51% and also that it was intending to acquire approximately 20%. Obviously Kantor is groping to find "falsehoods" when none exist.

11. Regarding the 300,000 share intention (Kantor Aff., ¶¶12, 21), Zimmerman and I did consider what we thought would be the maximum number of shares that might be acquired if D-Z were able to raise \$1,250,000, from its private placement offering. Assuming a purchase price between \$6 and \$7 per share, margin borrowings of one-half of that amount, and a reasonable allowance for fees and expenses, the number would have approximated 300,000. I so testified (Davis-75), and so did Zimmerman (Zimmerman-49-52). Our mental exercise was, of course, based upon sheer conjecture, since there was no assurance that D-Z would ever raise the entire \$1,250,000 or that the market price of NJB would remain at the

Affidavit of Bruce R. Davis

same level or that the shares would be available. In fact, D-Z has not raised the \$1,250,000 or anything close to it. All that has been raised to date by placement of D-Z 6% notes is \$512,500. Moreover, I did not know and have never known the specific number of shares which D-Z would have to purchase in order to gain control of NJB (Davis-75, 77). If control could be obtained with lesser ownership through a proxy fight (because of the lack of any meaningful equity interest of management), I favored and continue to favor that course of action. Finally, as stated at page 13 of the accompanying affidavit of Joseph B. Russell, Esq., D-Z's attorney who prepared its Schedule 13D, (the "Russell Affidavit"), there is simply no requirement in that Schedule for a disclosure of the exact number of shares that a 5% beneficial owner may have determined ultimately to purchase. My plans regarding additional purchases were stated as clearly as I knew how. Thus, the Schedule 13D states that D-Z may take such action in order to acquire control of NJB, including:

"(i) Acquisition of additional NJB Shares, either alone or in conjunction with others, through private or open market transactions, or through formal tender offer, when opportune situations to do so arise (which acquisitions will depend upon the availability of NJB Shares on the open market, the willingness of holders of large blocks to sell their shares and general economic and market conditions);" (Excerpt from Item 4, D-Z's Schedule 13D)

12. In responding to Item 3 of Schedule 13-D, --

Affidavit of Bruce R. Davis

"Source and Amount of Funds or Other Consideration" -- D-Z has reported with precision not only the source of funds used for purchases of NJB shares but, has reported as well, in Schedule B thereto, the amount of funds actually available to D-Z. Thus, Schedule B to D-Z's Schedule 13D, dated May 3, 1974, shows that an aggregate of \$350,000 of D-Z's 6% unsecured notes had been placed, while the text of Item 3 of that Schedule states that only "\$254,783 thereof [referring to the aggregate purchase price of NJB shares acquired by D-Z as of such date] was paid out of D-Z's own funds"; in Amendment No. 1 filed May 21, 1974, Schedule B thereto shows that \$450,000 of D-Z's 6% promissory notes had been placed, while the text of Item 3 shows an expenditure of only \$285,536 out of D-Z's own funds. At all times D-Z accurately reported not only the source and amount of funds expended for the purchase of shares of NJB, but also the amount and source of any funds that were available to it or that were legally committed to it under binding agreements.

13. If D-Z had responded to Item 3 of Schedule 13D in the irresponsible manner desired by defendants, namely, that it should have stated that it proposed to sell \$1,250,000 of its 6% unsecured notes, and that it was negotiating with other would-be lenders (all without success), it would have been engaged in misleading speculation and prognostication resulting in the creation of a false inference that it regarded such funds as being reasonably obtainable -- which they were not, as time confirmed.

Affidavit of Bruce R. Davis

Other than as set forth in D-Z's Schedule 13D and the amendments thereto, D-Z has not had, and does not presently have, any binding commitments for funds with which to make purchases of NJB shares.

14. The Kantor Affidavit further charges that D-Z's Schedule 13D "conceals" facts set forth in its private placement memorandum relating to a contemplated sale of units (consisting of stock and long term notes) of D-Z to its noteholders (Kantor Aff., ¶22). Kantor has not stated why such information is in any way relevant or material to an information statement filed pursuant to Rule 13d-1, nor is there any requirement in Schedule 13D for the inclusion of such information (Russell Affidavit, p.13). In fact, no such units have ever been offered or sold to D-Z's note purchasers or to anyone else.

15. The fact that the NJB shares purchased by D-Z will be pledged to secure margin borrowings made by D-Z in connection with the purchase of such shares of NJB is, of course, expressly set forth in both D-Z's private placement memorandum (Kantor Aff., Ex. G, p.6) and D-Z's Schedule 13D (Item 3). Accordingly, Kantor's charges relating to the supposed non-disclosure of D-Z's margin purchases are patently false (Kantor Aff., ¶19(3)).

16. Defendants state that D-Z's Schedule 13D is deficient in that it fails to disclose "that all of the issued and outstanding stock of D-Z had been pledged by Security and Zimmerman to secure the repayment of the 6% notes issued in D-Z's pur-

ported private placement". (Kantor Aff., ¶19(5)). Apparently, Kantor is basing his assertion upon a statement appearing in the private placement memorandum (Kantor Aff., Ex. G, p.8). I challenge the relevancy and materiality of this alleged deficiency, especially since all the noteholders, officers and directors of D-Z have been disclosed in the Schedule 13D, so that there are no "hidden interests". I also deny Kantor's assertion. I hereby inform this Court that (i) no portion of D-Z's issued and outstanding stock has been pledged to D-Z's noteholders or to anyone else or deposited in escrow to secure repayment of D-Z's 6% notes, (ii) there is no security agreement or other arrangement granting D-Z's noteholders any security interest in or lien upon the NJB shares acquired by D-Z (Davis-163), and (iii) although an escrow agreement may have been contemplated by the terms of the private placement memorandum, no such agreement in fact exists.

17. Kantor asserts that D-Z's Schedule 13D fails to reveal that D-Z intended to "effectuate a merger of NJB if it obtains control". (Kantor Aff., ¶19(7); Kantor Supp. Aff., ¶ 11). In this regard I respectfully invite the Court's attention to Item 4 of D-Z's Schedule 13D, in which it is explicitly stated that a merger of NJB with D-Z and/or Security is possible:

"subject to further review of NJB's assets and all other relevant circumstances, D-Z believes it may then be desirable to recommend one or more of the following: ... (b) if a study proves that a combination may be effected upon appropriate terms in the best interest of all parties concerned, to

Affidavit of Bruce R. Davis

effect a merger, consolidation or other combination of NJB with D-Z and/or with Security".

This is precisely the same thought expressed on page 6 of D-Z's private placement memorandum:

"The Company [D-Z], at a subsequent date, may consider the merger into the REIT in which it may acquire a substantial interest, or Security or both. The Company is not in a position at this date to state what it will ultimately do in these respect[s]."

A merger of D-Z and/or Security and/or NJB has always been seriously contemplated if D-Z were to be successful in achieving control of NJB and if a study proved that a merger could be effected upon appropriate terms. This fact has been set forth in D-Z's filings. However, it would have been irresponsible and misleading for D-Z's Schedule 13D to have indicated either that (i) a merger of D-Z with Security or NJB would definitely take place or (ii) that a merger was the only possibility under serious contemplation. Indeed, the merger "concept" never even advanced to the formulation of exchange ratios, the type of merger (two-party or three-party) that would be proposed, or the identity of the constituent corporations to such a merger, since D-Z, as an outsider working from 10K's and other publicly available financial reports of NJB, was not in a position to evaluate the real worth of NJB or the impact of a merger of D-Z and/or of Security with NJB.

18. In responding to Item 4 of Schedule 13D, -- "Purpose of Transaction" -- D-Z set forth each type of transaction

that I believed at the time of the filing of D-Z's Schedule 13D had a reasonable likelihood of coming to fruition if D-Z were to achieve its objectives. Since D-Z's response to Item 4 has been challenged repeatedly in the Kantor Affidavit as being "meaningless" and has been quoted out of context,* I am taking the liberty of setting forth the full text of D-Z's response to Item 4 of Schedule 13D herein:

"ITEM 4. PURPOSE OF TRANSACTION.

In purchasing NJB Shares, it is the intention of D-Z to acquire a sufficient ownership interest in NJB to influence management decisions and, ultimately, to determine the management and policies of NJB. Depending upon future circumstances not now known, D-Z may take such action from time to time as it may deem appropriate, in the light of future developments, in order to obtain control of NJB and for the best interests of NJB. Such future actions may include:

- . (i) Acquisition of additional NJB Shares, either alone or in conjunction with others, through private or open market transactions, or through formal tender offer, when opportune situations to do so arise (which acquisitions will depend upon the availability of NJB Shares on the open market, the willing-

* Paragraph 20 of Kantor's Affidavit states in its entirety:

"20. In lieu of candidly setting forth D-Z's intention to obtain control of NJB, and the existence of specific, carefully worked-out plans to that end, D-Z's 13D filings completely misrepresent its intentions by blandly stating instead that D-Z 'may take such action from time to time as it may deem proper in light of future developments in order to obtain control of NJB and for the best interests of NJB'."

I am surprised that such a gross distortion would even be attempted.

Affidavit of Bruce R. Davis

ness of holders of large blocks to sell their shares and general economic and market conditions);

(ii) Seeking representation on the Board of Trustees by means of solicitation of proxies or otherwise;

(iii) Joining with other shareholders, or other persons or groups, in a common effort to influence management of or obtain control of NJB; and/or

(iv) Seeking to change the investment advisory arrangements of NJB.

Should D-Z, alone or in conjunction with others, obtain control of NJB, it intends, subject to a study of all of NJB's assets and all other relevant circumstances then obtaining, to consider the possible disposition of certain assets of NJB and the effecting of changes in its lending policies with a view to improving the operating results of NJB and, subject to further review of NJB's assets and all other relevant circumstances, D-Z believes it may then be desirable to recommend one or more of the following:

(a) Discontinuing the status of NJB as a real estate investment trust (unless and until it is determined to effect such discontinuance, it is not the intention of D-Z to take any action which would jeopardize NJB's status as a real estate investment trust under the applicable provisions of the Internal Revenue Code, as amended);

(b) If a study proves that a combination may be effected upon appropriate terms in the best interest of all parties concerned, to effect a merger, consolidation or other combination of NJB with D-Z and/or with Security; and/or

(c) The acquisition by NJB of other real estate investment trusts by purchase,

merger or otherwise on such terms as may be in the best interests of NJB and its shareholders (although it should be noted that D-Z does not have any present plans or proposals to that end, nor has management of D-Z determined which, if any, other such trusts might be so acquired).

Except as mentioned above, D-Z has no present intention, nor has it in any event formulated any specific plan or proposal, to liquidate NJB or to make any major change in its business or structure." (D-Z Schedule 13D, Item 4).

19. At no time has D-Z singled out any one technique or program, to the exclusion of all others, by which it would achieve control of NJB. D-Z did not have, and does not have, the requisite funds available to it to have the luxury of single mindedness. Obviously, D-Z could be successful in attaining control of NJB by any one of several means: a direct share accumulation program; a proxy fight; the formation of a shareholders' protective committee in which D-Z would join with other large shareholders of NJB; or through the making of a tender offer. All such approaches have been and are being given serious consideration. Similarly, D-Z's response in its Schedule 13D as to its plans for NJB if it acquires control reflects an appreciation of the sophisticated legal problems, of both a tax and securities nature, as well as the economic problems of NJB which would all require the most careful analysis before any course of conduct with respect to the affairs of NJB could be recommended to, much less adopted by,

NJB's other shareholders.* D-Z's response also reflects an awareness that it would be required to amend its Schedule 13D at such time as it either fixes its intentions with respect to a single program to acquire control of NJB or with respect to actions it will take if it does in fact acquire control of NJB. I cannot believe Mr. Kantor is sincere when he asks for more than that.

20. Kantor repeatedly charges that D-Z's Schedule 13D is deficient because it does not provide information relating to the ability of D-Z to repay its 6% unsecured notes. Kantor has leaped to the erroneous conclusion that D-Z can repay its notes only by taking control of NJB and utilizing its assets. (Kantor Aff., ¶¶19(8), 24(d)). Kantor is laboring under a serious misapprehension when he assumes that D-Z cannot repay its notes without utilizing assets taken from NJB. D-Z's private placement memorandum informed each note purchaser that its ability to repay the notes was dependent upon: dividends it might receive from the REIT whose stock it acquired; the ultimate sale of the stock to be acquired with the noteholder borrowings; the possibility of a merger with the real estate investment trust by D-Z and or Security;

* Kantor's complaint (Kantor Aff., ¶9) that D-Z's Schedule 13D does not make reference to the possible disposition of certain NJB assets only further confirms my belief that Kantor has either not read the 13D or is willing to "say anything" in total disregard of its contents. Item 4 of D-Z's Schedule 13D expressly provides that

"[s]hould D-Z ... obtain control of NJB, it intends, subject to a study of all of NJB's assets and all other relevant circumstances then obtaining, to consider the possible disposition of certain assets of NJB..."
(Emphatics supplied).

and, finally, a contemplated offering by D-Z of D-Z's stock and long-term notes or a combination of two or more of the foregoing. If D-Z accumulated a controlling block of shares of NJB, it might well be able to dispose of it at a premium. As Zimmerman testified, we always had in mind the benefit to be achieved for D-Z by increasing the value of the NJB stock it was acquiring (Zimmerman-214). Further, NJB has declared dividends during its most recent year of approximately \$4,500,000. Assuming the payment of dividends at anywhere near the same rate in the current year, D-Z would have no difficulty in servicing and repaying its debt. Moreover, if D-Z were to obtain control of NJB so that our expertise could be utilized in turning NJB around, and increasing its profitability, I would expect the market value of shares of NJB to rise dramatically. D-Z would then obtain substantial additional margin loans against its holdings of NJB shares and use such funds to repay its noteholders. In short, Kantor's charges emanate from his imagination. In reality, I would not be so foolish as to "milk" NJB's assets as defendants charge. As the largest shareholder of NJB, D-Z would have the most to lose from such a short-sighted policy. The shares can only rise in significant value if the earnings base is enhanced and made more secure. If Kantor means to hint or imply that anyone would steal or otherwise mishandle NJB's assets, then I would suggest that he turn his suspicious mind towards his own clients rather than towards others.

21. Kantor states that D-Z's Schedule 13D fails to re-

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veal that D-Z has issued standing instructions to its broker to purchase every share of NJB it can get. (Kantor Aff., ¶¶18, 19(9)). This is simply not true -- no such standing instructions were ever given by me or any other officer of D-Z. Indeed, D-Z could not possibly have issued such instructions, since it does not have the funds necessary to "purchase every share of NJB it can get". As I testified at my deposition, the authority given by me to CF was limited as to both the number of shares of NJB that could be purchased without my express prior approval (4,000 in any one day) and the price at which NJB shares could be purchased (market price). (Davis-350-351). I further testified (Davis-351), "If they [CF] purchased in one day 10,000 shares and got my permission ... the next day before they begin purchasing, they'd find out about the [D-Z's] purchasing ability".

22. To emphasize these limitations on purchasing and the fact of their implementation, I refer this Court to the affidavit of William P. Miller, Senior Vice President of CF. Miller's affidavit sets forth (i) the weekly volume of NJB shares traded on the American Stock Exchange for the thirty-week period commencing with the week ending January 4, 1974 and terminating with the week ending July 26, 1974; (ii) the high and low prices of NJB shares during each such week; and (iii) the number of NJB shares purchased each week by D-Z on the American Stock Exchange during such period. Such chart clearly reflects that D-Z did not purchase every share which was available -- far from it. D-Z's buying program has been strictly limited.

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23. On each day in which D-Z purchased more than 4,000 shares of NJB, I was consulted and gave my prior consent. As to the four privately negotiated or third market purchases aggregating 97,200 shares (April 23, 60,000 shares; May 24, 25,000 shares; June 14, 5,000 shares; and July 3, 7,200 shares), I was either with Miller at CF's offices in New York or he consulted with me by telephone. As is more fully set forth in Miller's affidavit, each of the sellers of NJB shares in these privately negotiated transactions was a financial institution which regularly buys and sells large blocks of securities. On each day that D-Z's purchases of NJB shares made through the facilities of the American Stock Exchange exceeded 4,000 shares (April 22, 4,600 shares; April 26, 5,400 shares; July 2, 10,000 shares), I was either with Miller at CF's offices in New York or he consulted with me by telephone. D-Z's aggregate purchases of NJB shares made through the American Stock Exchange were 68,800 shares. As is more fully set forth in Miller's affidavit, orders placed for the account of D-Z with American Stock Exchange member firms were customarily for blocks of 1,000 share. Over the entire period during which D-Z has purchased shares of NJB, no shares of NJB were purchased by D-Z at a price higher than the last preceding sale price on the American Stock Exchange.

24. Kantor's entire argument comes down to certain testimony of Mr. Orbe of CF which Kantor construes to mean that I had authorized unlimited purchases of NJB shares. Whether Mr. Orbe

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misunderstood the limits of my authorization or whether his deposition testimony is confused as to what he believes to have taken place, the fact remains that my instructions to CF with respect to limits on purchases of NJB shares were as I have stated herein and such instructions were carried out at all times.

25. D-Z's Schedule 13D is further attacked by Kantor, who states:

"The D-Z 13D misrepresents Cantor, Fitzgerald's role in plaintiff's activities. Thus, the 13D states only that 'the balance of the purchase cost was obtained by margin borrowings of \$3 per share from Cantor, Fitzgerald, ... secured by pledge of the NJB shares purchased' and that Cantor, Fitzgerald 'has been retained to render certain services in connection with D-Z's purchase of NJB Shares. ...' (Exhibit 'C', pp. 2, 5.) But the 13D is grossly misleading in failing to state that Cantor, Fitzgerald had rendered investment counseling services in connection with Davis' desire to expand Security's business by merger or acquisition, and specifically that Cantor, Fitzgerald had approached NJB on behalf of Security with an acquisition proposal." (Kantor Aff. ¶23).

Kantor has failed to consider the letter agreement with CF dated April 25, 1974, which is part of D-Z's Schedule 13D (Ex. B. hereto). As previously indicated, Kantor has omitted annexing it to the copy of D-Z's Schedule 13D appended to his affidavit. His quotations from D-Z's Schedule 13D are juxtaposed in a manner which can only be intended to distort the scope and completeness of D-Z's disclosures in response to Items 3 and 6 of such Schedule. Kantor's first quotation is from a portion of D-Z's response to Item 3, "Source and Amount of Funds or Other Consideration". As

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to that item, the information furnished with respect to the dollar amount of margin borrowings on purchases of NJB shares made prior to May 3, 1974 is complete and accurate. Kantor's quotation from Item 6 of D-Z's Schedule 13D is grossly incomplete. Item 6 itself only paraphrases the letter agreement with CF of April 25, 1974.

26. The services referred to in the April 25 Letter Agreement with CF are, of course, those financial services customarily rendered by investment bankers to their clients in these circumstances and were obviously intended to include introductions to sources of major financing. Furthermore, the letter agreement expressly sets forth the following additional information: (i) D-Z, (as assignee of Security) agreed to pay a fee of \$30,000 to CF and to reimburse CF for its out-of-pocket expenses in connection with such services; (ii) as a separate and distinct obligation, D-Z undertook to pay CF commissions on purchases of NJB shares at a negotiated price; and (iii) CF undertook to use its "best efforts to obtain funds sufficient to permit purchases of shares on margin (provided such shares are marginable in accordance with applicable rules and applications)". Thus, D-Z's Schedule 13D, with the April 25 Letter Agreement appended to it as an exhibit, makes full and complete disclosure of CF's role in D-Z's affairs.

27. Kantor refers to an understanding between D-Z and CF and a proposed letter agreement under which CF would be entitled to receive a 5-4-3-2-1 fee if they were to assist in

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arranging major financing for D-Z (Kantor Supp. Aff., ¶16 and Ex. 3 thereto). As stated in the Russell Affidavit (p.17), even if D-Z had executed a form of letter similar or identical to that contained in Exhibit 3 to Kantor's Supplemental Affidavit, it would not be required to be disclosed in a Schedule 13D unless and until commitments for financing involving CF have in fact been obtained. While I regard such an agreement as unimportant, since it merely records what is normal practice in the industry anyway, I have nonetheless checked D-Z's files and am satisfied that the Exhibit 3 letter was never executed.

28. The fact that CF had rendered services for Security in February and March of 1974 in connection with proposed merger partners for Security (which Kantor acknowledges have been abandoned) is, I submit, ancient history and quite irrelevant to this case. Security's interest in D-Z is as set forth in D-Z's Schedule 13D. If Security had any other rights or interests, or understandings with respect to its participation in D-Z, D-Z would have set them forth as is required by Schedule 13D. Security's entire interest in D-Z is, as I have indicated, fully set forth in D-Z's Schedule 13D.

B. The Charge of Unlawful Proxy Solicitation is False.

29. Kantor accuses D-Z of having "authorized" the solicitation of proxies for the call of a special shareholders' meeting of NIB (Kantor Aff., ¶¶19(10), 40-45; Kantor Supp. Aff., ¶¶32-

36). This accusation is palpably false. Neither D-Z nor any of its officers or directors has ever requested or authorized anyone to solicit shareholder consents or proxies for the call of a special meeting and, indeed, no such solicitation has ever taken place.

30. D-Z's position with regard to the acts complained of by defendants is confirmed by the testimony of Miller of CF:

"Q. What I sought to ascertain from you--I don't know if it is three questions back or now many questions back--is whether or not you discussed with Mr. Davis the subject to [sic] someone from Cantor, Fitzgerald contacting shareholders of NJB to ascertain what their attitudes were?

"A. I never discussed that with Mr. Davis.

"Q. You never discussed that with him?

"A. No." (Miller-36)

It is further confirmed by my testimony:

"Q. Have you given Cantor, Fitzgerald instructions with respect to what use they should make of that shareholders list?

"A. No." (Davis-304)

I then amplified that answer:

"Q. Have you given Cantor, Fitzgerald any instructions not to use the shareholder list for any purpose?

"A. The only general statement I made to Cantor, Fitzgerald was that anything that they do in this entire transaction be done in accordance with the rules and regulations, whatever they may be, because they were much more familiar with the rules than I am."
(Davis-305)

31. I am now aware that Schwartz of CF had telephone conversations on June 18, 1974 (and possibly June 17) with a total of 13 NJB shareholders which were made at the instance of Miller who on June 18 suggested to him that he "might call a few of the people and find out what their attitude [is] toward management" (Schwartz-35; Miller-23). Miller told Schwartz at the close of the day on June 18 of counsel's advice that "no further calls are to be made" (Schwartz-184, 189-190; Miller-29) and no further calls were made (Schwartz-183, 191).

32. Neither I nor any other officer of D-Z ever instructed CF to call any shareholders to ascertain their attitude toward incumbent management (Davis-296, 304; Miller-36); nor was I or any other officer of D-Z aware that Schwartz had made the telephone calls here in question until after the fact (Davis-304; Miller-36). No proxies for the call of a special meeting, or for any other purpose, were obtained as a result of Schwartz's telephone calls and no written communications were sent to, or received from, any of the shareholders contacted by Schwartz. Seven of the 13 shareholders surveyed indicated that they favored management (Schwartz-109, 116, 124, 132, 144, 160, 180) and three of the 13 surveyed indicated that they were not content with manage-

ment* (Schwartz-150-151, 170, 172). Schwartz's survey ceased long before any of the defendants appeared in this action.**

33. Kantor proceeds to distort the purpose and content of Schwartz's telephone calls and tries to create the impression that there may have been "many more" telephone calls in addition to the 13 acknowledged by Schwartz. Thus, Kantor asserts, without citing to a single line of testimony, that the depositions of Miller and Schwartz reveal that Schwartz made the telephone calls in question "in order to obtain support for Davis' plan to convene a special shareholders meeting for the purpose of ousting the existing NJB management" (Kantor Supp. Aff., ¶33) (emphasis supplied). The testimony of Miller and Schwartz reveals nothing of the sort. Rather, as the following excerpt from Miller's testimony makes clear, the purpose of the telephone calls was to ascertain the attitude of NJB shareholders toward incumbent management, not to solicit proxies or consents as part of a plan to line-up support for a special meeting:

[After Miller testified that he suggested to Schwartz that he call some stockholders "to find out what their attitude is with respect

* Of the remaining 3 shareholders, two did not express an opinion regarding management (Schwartz-95; 137-38) and Schwartz could not recall what attitude, if any, the third expressed (Schwartz-176).

** Defendant NJB filed its answer and counterclaims on June 24 and the individual defendants, the moving parties herein, filed their answer and counterclaims on July 14. Thus, it is clear that Schwartz's activities did not cease because of this litigation.

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to their holdings in NJB", there ensued the following questions and answers:]

"Q. Do you recall saying anything further than what you have just testified to? Can you supply the exact words you used or any further details?

A. I think the term I might have used might have been I would like to take their temperature to find out if they are happy or unhappy with the position that they are holding.

Q. Irrespective of what you might have said, do you recall what you did in fact say? If not, please don't speculate. Did you actually say that? Do you have any recollection of saying that?

A. I recall using the words "take temperature." (Miller Tr. 23).

34. In his attempt to establish "solicitation", Kantor has also misrepresented the content of Schwartz's telephone calls. Thus, Kantor states: "Schwartz typically would then inquire whether the listener would be willing to 'join in an effort to obtain a special meeting" (Kantor Supp. Aff., ¶34). The following representative excerpts from Schwartz's testimony should suffice to demonstrate that that statement is simply untrue:

"Q. Now, did you in words or substance, state to Mr. Rosenberg, that your client was seeking Mr. Rosenberg's support in his dissatisfaction with present management?

A. No. (Schwartz-82)

* * *

Q. And you were seeking to obtain from your standpoint a favorable attitude towards your client's position, isn't that so?

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A. I was not trying to influence them. I was trying to find out how they felt. (Schwartz-84)

* * *

Q. Did you ask him, in words or substance whether he would vote in a manner favorable to your client's view?

A. I didn't solicit votes. (Schwartz-96)

* * *

Q. And did you seek to ascertain from him whether he would join in an attempt to call such a special meeting?

A. No. (Schwartz-113)

* * *

Q. And did you question them as to whether or not they would join in an attempt to get a special meeting?

A. No. (Schwartz-118)

35. Kantor also misrepresents the content of the telephone calls when he asserts that Schwartz advised the recipients of the calls that "his client wished to call a special meeting of shareholders to oust management" (Kantor Supp. Aff., ¶34). Schwartz testified only that he "mentioned the possibility" of there being a special shareholders' meeting (Schwartz-128, 133, 151).

36. Despite Kantor's extensive verbiage, the entire episode must be seen in perspective. Only 13 of NJB's approximately 3,000 shareholders were called. Schwartz's actions were extremely limited. His communications were simply an attempt to "test the water", so to speak, by revealing shareholder attitudes

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toward incumbent management. It is manifest from Schwartz's testimony that he made no statements to the shareholders he contacted which were in any way designed to induce the giving of a proxy, and, indeed, no proxies were in fact obtained.

C. Defendants' Attempt to Champion
the Cause of D-Z's Noteholders
Is Specious.

37. As to the assertions in sub-parts (6) and (11) of paragraph 19 of the Kantor Affidavit, I am unable to respond to conclusions of law, and must accordingly refer the Court to the Russell Affidavit. However, I do find it remarkable that the defendants who, on the one hand are suing D-Z's noteholders in this action and who have subjected them to needless harrassment are, on the other hand, attempting to be their champions by asserting that these people have been misled. The charge is not only advanced in bad faith, but is also without any relevance to the question of the correctness of the Schedule 13D filing.

38. Further, D-Z's private placement memorandum (Kantor Aff. Ex. G) was prepared by the law firm of Haas, Holland, Levison & Gibert of Atlanta following a meeting which Zimmerman and I attended at their offices on or about April 21st or 22nd (Zimmerman-69; Davis-162). Zimmerman and I furnished the information to the Haas, Holland firm which enabled them to draft the documents (Davis-162). The lawyers determined the nature of the commitments that were to be made to the note purchasers as well as

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the sufficiency of the disclosures which were required to be made in D-Z's private placement memorandum, so that the document would comply with federal and state securities laws. As I testified, "In this area, we let the lawyers call all the shots." (Davis-172). As I further testified, at a subsequent meeting at the Haas, Holland firm after the memorandum was prepared, Zimmerman, Saul Becker and I were given extensive instructions by the attorneys relating to the private aspects of the offering and how we should comport ourselves in the sale of D-Z's 6% notes (Davis-168). Zimmerman was primarily responsible, and Saul Becker, to a lesser extent, for the offering of D-Z's notes and they were both concerned about proceeding in a lawful manner (Davis-169, 170). The private placement memorandum did not disclose the name of the REIT in which D-Z proposed to accumulate stock since we were advised that disclosure of the name of the REIT could lead to violations of the securities laws if such disclosure took place prior to the time D-Z filed a Schedule 13D (Davis-170).

39. Contrary to Kantor's frantic cries as to the number and sophistication of the offerees of D-Z's 6% notes (Kantor Aff., ¶¶26-32), Zimmerman's uncontradicted testimony shows that seven of the eight persons who purchased D-Z's notes (other than Security and Zimmerman) were personally known to him for a minimum of four years and in most cases far longer. Each of the seven note purchasers was a member of the business or professional community of Atlanta, of recognized standing, and had, in many

instances, participated with Zimmerman or Security or me in other transactions. The identity of the note purchasers, the amount of notes purchased, and their prior relationship with Zimmerman, Security or me, and their affiliations are as follows: Bernard Kroll (\$100,000) is the president of Holder Construction Company, was known to Zimmerman for at least four years (Zimmerman-150) and is a close personal friend of mine (Davis-194); Max Sophier (\$50,000) was known to Zimmerman for approximately twenty years (Zimmerman-154), is a manufacturer of leather belts (Zimmerman-155) and a prior investor in a partnership known as The 14th Street Company which Zimmerman and I had organized (Zimmerman-86, 154); Harold Levow (\$50,000) was known to Zimmerman for more than twenty years (Zimmerman-158) and is a partner of Max Sophier in the leather belt manufacturing business (Zimmerman-155); Dr. Harold Levin (\$50,000), a dermatologist, was known to Zimmerman for in excess of thirty years (Zimmerman-159) and had invested \$90,000 with Zimmerman and me in The 14th Street partnership (Zimmerman-90, 159); Harvey Jacobson (\$50,000) was known to Zimmerman for in excess of thirty years (Zimmerman-161), is the President of National Linen Service, a Division of National Service Industries, a listed company on the New York Stock Exchange, and had participated with Zimmerman in two real estate ventures over the years (Zimmerman-162-163); Dr. Seymour Weinberg (\$50,000), an obstetrician, was also known to Zimmerman for twenty years (Zimmerman-165) and had invested approximately \$45,000 to \$50,000 in the 14th Street partnership (Zimmerman-90, 165). Zimmerman also

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testified that he knew Dr. Ronald Feinman, an orthodontist, for more than five years (Zimmerman-166); but as was brought out at my deposition (Davis-190), the note purchased by Dr. Feinman was offered to him by Saul Becker ("Becker"), a Vice President of D-Z, who is also Dr. Feinman's uncle. Zimmerman also testified (Zimmerman-182-187) that he met each offeree in person and would not discuss the potential investment in D-Z without delivering to each of them a copy of D-Z's private placement memorandum.

40. Kantor is misleading this Court in trying to create the impression that Zimmerman stood on the street corners of Atlanta and in the corridors of the Standard Club of Atlanta, offering this investment to anyone who passed by. Zimmerman testified to a limited number of offerees who did not purchase the D-Z notes (Zimmerman-216-217). In all cases, the offerees approached by Zimmerman were drawn from a close circle of long standing business and social acquaintances. Defendants' counsel complain that Zimmerman solicited his offerees out of a personal telephone directory (Zimmerman-217-218), but it is a deliberate distortion to attempt to infer from this fact that D-Z was engaged in "extensive solicitations and the making of numerous offers to individuals of limited investment acumen" (Kantor Aff., ¶26). Kantor's assertion that Zimmerman's testimony shows "an unlimited pattern of solicitation" is a contrived and untrue conclusion rather than "an obvious conclusion" (Kantor Aff., ¶27).

41. Defendants' anguish regarding the absence of an

affirmative right of D-Z's 6% noteholders to exchange such 6% notes for a combination of voting stock of D-Z and long-term notes of D-Z is remarkable (Kantor Aff., ¶¶27(d), 28 and 30). Under the heading "Issue of Units Under Small Registration" of D-Z's private placement memorandum, D-Z's intent to register a unit offering of its voting stock and long-term notes by September 1, 1974, is expressly set forth. Since the small issue registration had not taken place, Zimmerman could only state, and the note purchasers understood, that it only "was contemplated" and that it was D-Z's "intent" (Zimmerman-134,192). Common sense dictates that, upon the effectiveness of the registration of the unit offering, D-Z would first offer a right to participate to the holders of its 6% notes. Zimmerman and I were dealing with an extremely small number of people. All of them were known to us or to Becker. In our view, it was imperative that D-Z and the noteholders have a "handle" on the outcome of its activities before finalizing arrangements with them.

42. Each of D-Z's note purchasers executed a "Certificate and Purchase Order" in the form of Exhibit 3 to the private placement memorandum in which, among other things, such note purchaser made the requisite investment representation; acknowledged his significant business and investment experience; acknowledged that he was purchasing the note without being furnished any offering literature other than the private placement memorandum; and recognized that the note would not be marketable. So far as is

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known to me, and after conversations with Zimmerman with respect thereto, none of the note purchasers lends money or otherwise makes credit available in the ordinary course of their respective businesses. Upon reading the transcripts of the deposition testimony of the note purchasers, I first became aware that three note-purchasers (Kroll, Jacobson and Weinberg) had made bank borrowings in connection with funds used for their respective purchases of D-Z's 6% notes. As to Kroll and Jacobson, their testimony shows that the borrowings were entirely unsecured. As to Dr. Weinberg, his testimony shows that the bank borrowing was secured by his personal marketable securities, which did not include shares of NJB.

43. Kantor maintains that CF "had from the beginning acted in close concert with Davis in formulating the plan to take over NJB". (Kantor Aff. ¶35). This belief then leads him to assume that, because CF had a copy in its files of D-Z's private placement memorandum and of its 6% notes, they were completely aware of, and indeed participated in, D-Z's note offering. Kantor's assumptions notwithstanding, the fact remains that CF had absolutely nothing to do with D-Z's private placement memorandum or the offering of D-Z's 6% notes. As I have indicated, the offering of D-Z's 6% notes and the preparation of its private placement memorandum were done among Zimmerman, Becker and myself with D-Z's Atlanta counsel (Davis-162). Miller, of CF, testified that the first time he or anyone else at CF saw D-Z's private placement

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memorandum, dated April 24, 1974, was one to two weeks after the filing of D-Z's Schedule 13D on May 3, 1974 (Miller-83). When Miller was again questioned on this subject, he testified unequivocally that neither he nor anyone else at CF had anything to do with D-Z's private offering of notes:

"Q. Is it fair to say that you really knew nothing about the undertakings or dealings between Davis and Zimmerman and these people in Atlanta?

A. Yes.

Q. Other than the Beckers?

A. Yes.

Q. And you have never sought to inform yourself about this?

A. Correct.

* * *

Q. Mr. Miller, have you personally or has any employee, officer or director of Cantor, Fitzgerald sought to introduce any potential buyer of the six percent promissory notes to either Mr. Davis or Mr. Zimmerman?

A. No." (Miller-94-95)

D. D-Z's Acquisition of NJB Shares
Could Not Possibly Affect NJB's
REIT Status.

44. Defendants' in their memorandum of law (p. 23) assert that "if plaintiff ultimately succeeded in acquiring any more than 50% of NJB's outstanding shares, plaintiff will have ipso facto destroyed NJB's REIT status, even assuming, arguendo, that it had no actual plans to do so in any event." As a certi-

fied public accountant, I am keenly aware of the provisions of the Internal Revenue Code applicable to a REIT. As D-Z stated in its Schedule 13D (Item 4(a)), it is not the intention of D-Z to take any action which would jeopardize NJB's status as a real estate investment trust, unless the discontinuance of such status is first determined and thereafter disclosed.

45. Defendants' counsel have failed to point out that under the attribution rules, the D-Z stock owned by Security shall be deemed to be proportionately owned by Security's shareholders. If they applied this rule of law to the facts of this case, they would have reached the same conclusion that I, together with D-Z's counsel, reached in April -- to wit, even if D-Z were to acquire 51% of the stock of NJB it would have absolutely no impact on NJB's qualification as a REIT under the Internal Revenue Code.

E. It Would Be Improper For D-Z's
Schedule 13D to Disclose Pending
Negotiations for Financing.

46. At great length Kantor explores the fact that D-Z has had discussions with at least four sources of potential financing between May 3 and the dates of my deposition, July 22 and 23, 1974 (Kantor Supp. Aff., ¶¶5-10). I testified exhaustively both as to the scope and status of these negotiations (Davis-78-147). As defendants well know, the "bottom line" of these discussions is that D-Z did not obtain, and does not have today a binding commitment for, additional financing with which to

purchase shares of NJB. Despite the protestations of defendants' counsel at my deposition, I did not disclose the identity of sources "A", "B", "C", and "D" with whom D-Z had negotiated since discussions were continuing with certain of those sources and no commitment had been made. With regard to the agreement of June 27, 1974 with Financial Resource Corporation ("FRC") I testified fully and candidly (Davis-85-90).

47. Judge Duffy, of this Court, at a hearing on July 16, 1974, confirmed the judgment of D-Z's counsel that in view of the fact that no commitment had been obtained by D-Z (other than the FRC letter, which had been abandoned), D-Z should not be required to disclose the names of sources of potential financing with whom discussions were in progress. The reasoning which enabled Judge Duffy to reach his conclusion as to the immateriality of discussions with potential lenders or investors is, I submit, equally applicable to the disclosure of such information in D-Z's Schedule 13D. If D-Z should obtain a binding commitment making funds available to it either by way of debt or equity to be used in connection with its objective to acquire control of NJB, D-Z will amend its Schedule 13D to set forth the appropriate information with respect to such financing transaction.

48. Kantor falsely colors the FRC episode (Kantor Supp. Aff., ¶8) by his conclusions that (i) a firm commitment existed from FRC and (ii) that it fell through by reason of assumed violations of Regulation T. Kantor's allegation notwith-

standing, the FRC "commitment" (Kantor Supp. Aff., Ex. B) was not a commitment at all. D-Z paid \$5,000 to FRC as a non-refundable fee to induce FRC to undertake consideration of a firm commitment (Kantor Supp. Aff., Ex. B, ¶7). Under paragraph 8 of the FRC letter, D-Z would have been required to come up with an additional \$45,000 at such time as FRC was willing to make a firm commitment to D-Z to extend credit.

49. Before the ink was dry on the FRC letter, D-Z's counsel discussed with me various problems with respect to the commitment, particularly those arising under Regulation C as well as Regulation T (Davis-86-89). When counsel indicated that there were problems with the transaction, I promptly advised Mr. Eisenstein, President of FRC, on July 2, 1974, of D-Z's inability to go forward with the proposed transaction (Davis-89). As I testified, the proposed transaction which is the subject of the June 27, 1974 letter between D-Z and FRC was abandoned (Davis-85). It was not however abandoned, as Kantor contends, by reason of the pendency of the counterclaims asserted by NJB, but rather on the advice of D-Z's counsel.

50. Kantor's never-ending speculations continue in his assertion that "It is now clear that plaintiff intends to use NJB funds to repay whatever interim financing it obtains in consequence of these ongoing heretofore undisclosed negotiations" (Kantor Supp. Aff., ¶11). Again, Kantor is complaining about transactions which exist only in his imagination. He contends

that D-Z "intends" to use major amounts of NJB funds to repay the "anticipated massive commitments of D-Z" (Kantor Supp. Aff., ¶13). Kantor is tilting at windmills. If, as and when D-Z obtains the financing commitments, D-Z will be required to disclose the terms and conditions of these financing commitments in appropriate amendments to its Schedule 13D and defendants, if they choose, can then complain in court (as I am certain they will) that such amendments are "egregiously false and misleading". Regulation 13D imposes strict obligations on D-Z with respect to the time and manner in which it must disclose the source of funds which it intends to use in making purchases of NJB shares, as well as a description of the transactions in which it acquired such funds, and the names of the parties thereto. Said regulation has been and will continue to be fully complied with.

51. As a last resort, Kantor refers to a letter that I wrote to Saul Becker on March 15, 1974 (Kantor Supp. Aff., Ex. D). The letter was written as a general expression of my thoughts concerning REIT's in general and also to induce Becker to join in the effort that I was about to undertake. Although a tender offer is discussed in the letter as a means by which I might achieve control of an undetermined REIT (NJB is not mentioned), such tender offer, of course, never took place. Just as the tender offer referred to in the letter did not take place, neither did Security "fund the first \$1 million needed" as contemplated in that letter. Is any one part of the Becker letter more true today than any other

part? The answer is obviously no. Like so many other items that Kantor has seized upon as "evidence" of the intentions of D-Z, this letter is just one more indication of the various concepts I was considering in March of 1974 -- two months prior to the filing of D-Z's Schedule 13D -- and nothing more.

F. D-Z And NJB's Other Public Shareholders
Would Suffer Irreparable Harm if
Defendants' Motion Were Granted.

52. Defendants have not made out a case of any hardship to NJB which may result from D-Z's continued purchase of shares or its exercise of the right to vote the shares it has bought and paid for. Defendants' argument concerning possible loss of NJB's REIT status is utterly false and defendants are unable to conjure up any other theory (beyond their own self-interest) on which NJB might be injured if D-Z were to continue to purchase shares of NJB or exercise its right to vote those shares. It is indeed anomalous for the Trustees to stand up and claim that unless the election process is stifled they will suffer irreparable injury. The obvious fact is that, at best, they are supposed to function for, and at the pleasure of, the shareholders, who are the owners of the res which has been entrusted to their care. The shareholders of NJB are the beneficiaries of the Trust who have invested their dollars in its voting shares, something the defendants certainly have not done; the shareholders should not be deprived of the opportunity to have all of the facts placed

Affidavit of Bruce R. Davis

before them, and on that basis to choose the managers of their investment.

53. Defendants' contentions that D-Z will "milk" the assets of NJB, and for that reason should be treated as an out-cast, are unsupported by anything other than their own evil instincts. D-Z has no sinister plans. We believe that, when NJB has in excess of \$30,000,000 of loans in default, our expertise in both management and development of real estate properties would enable NJB to recoup its investments. It is D-Z and not defendants which is the largest equity owner of NJB. D-Z need not "milk" NJB for it can benefit by an increase in the value of its NJB shares, which would of course benefit all shareholders. Defendants, on the other hand, could not care less about the value of shares of NJB, for they own virtually none.

54. If D-Z were to lose this motion and thereby be enjoined from purchasing additional shares of NJB, from voting its shares of NJB, and from lawfully communicating with shareholders of NJB, it would almost certainly destroy D-Z as a potential threat to defendants' sinecure. As D-Z has stated in its Schedule 13D, its purchases of NJB shares were not made as a passive investment but with a view that D-Z would ultimately determine the management and policies of NJB. The 166,000 shares of NJB owned by D-Z were acquired at an aggregate purchase price in excess of \$1 Million. As seen from the Miller Affidavit, the prices paid for such shares

Affidavit of Bruce R. Davis

by D-Z exceed the present market value for shares of NJB. There is little doubt that if D-Z is enjoined from proceeding with its efforts to acquire control of NJB, it will have to dispose of its holdings in NJB at depressed prices. This will be to the detriment of D-Z, its noteholders and, as well, to all of the other 2,950 shareholders of NJB.

WHEREFORE, your deponent respectfully submits that the instant motion should in all respects be denied.

Bruce R. Davis

Sworn to before me this
15th day of August, 1974.

Notary Public

MARTIN A. COLEMAN
Notary Public, State of New Jersey
No. 50473511
Qualified in Essex County
JUL 1 1974

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EXHIBIT A--LIST OF SECURITY MANAGEMENT'S SHAREHOLDERS
ANNEXED TO AFFIDAVIT OF BRUCE R. DAVIS

STOCKHOLDERS LIST

SECURITY MANAGEMENT CO., INC.**

<u>Name</u>	<u>Number of Shares</u>	<u>Percentage Ownership</u>
Donald Press	7,000	1.75
Robert H. Stockel	7,000	1.75
Robert Martin	8,000	2.00
Arnold Frank	8,000	2.00
Leon Weiner	2,000	0.50
Moses Marx	2,000	0.50
Boris Podder	2,000	0.50
Ethel Weygand	2,000	0.50
Michael Pisano	8,000	2.00
Jules Nordlicht	4,000	1.00
Ronald Levin	12,160	3.04
Arlene Clovin	3,200	0.80
Beatrice Greenstein, Trustee	8,000	2.00
*Saul Becker	5,333	1.33
*Ralph Becker	5,334	1.34
*Harold Becker	16,880	4.22
*Sylvia Becker	23,093	5.77
Michael & Ann Feinman	4,000	1.00
Michael & Ronald Feinman	4,000	1.00
Louis & Frieda Lewis	4,000	1.00
Dorothy Weingarten	4,000	1.00
Burt Schulman	4,000	1.00
Jack Rothenberg	8,000	2.00
Sidney I. Rose	18,000	4.50
George S. Stern	18,000	4.50
Alan Cohn	4,000	1.00
Bruce R. Davis	<u>208,000</u>	<u>52.00</u>
Total Issued and Outstanding	400,000	100.00

*Saul Becker, Ralph Becker and Harold Becker are brothers. Sylvia Becker is the wife of Saul Becker. The aggregate percentage ownership of Saul Becker, Ralph Becker, Harold Becker and Sylvia Becker is 12.66%.

**There have been no changes in the ownership of stock in Security Management Co., Inc. from April 1, 1974 to and including the date of the affidavit to which this list is an exhibit.

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EXHIBIT B--D-Z'S SCHEDULE 13D ANNEXED TO
AFFIDAVIT OF BRUCE R. DAVIS

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

SCHEDULE 13D

Pursuant to Section 13 (d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z INVESTMENT COMPANY
420 14th Street N. W.
Atlanta, Georgia 30318

Address copies of all communications to:

JOSEPH B. RUSSELL, ESQ.
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

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Exhibit B Annexed to Affidavit of Bruce R. Davis

ITEM 1. SECURITY AND ISSUER.

This statement relates to Shares of Beneficial Interest, without par value ("Shares"), of NJB Prime Investors ("NJB"), a Massachusetts business trust, 950 Clifton Avenue, Clifton, New Jersey 07013.

ITEM 2. IDENTITY AND BACKGROUND.

This statement is filed by D-Z Investment Company ("D-Z"), a Delaware corporation having its principal office at 420 14th Street N.W., Atlanta, Georgia 30318.

The officers and directors of D-Z and their business and residence addresses are as follows:

<u>NAME</u>	<u>BUSINESS ADDRESS</u>	<u>RESIDENCE ADDRESS</u>
Bruce R. Davis	420 14th St. N.W. Atlanta, Ga. 30318	4332 Conway Valley Ct. N.W. Atlanta, Ga. 30327
Jerome Zimmerman	1260 Foster St. N.W. Atlanta, Ga. 30318	3144 Wood Valley Rd. N.W. Atlanta, Ga. 30327
Ralph M. Becker	420 14th St. N.W. Atlanta, Ga. 30318	23 Old Ivy Square Atlanta, Ga.
Saul Becker	800 Peachtree St. N.E. Atlanta, Ga. 30308	380 Valley Rd. N.W. Atlanta, Ga. 30305

The voting stock of D-Z is owned in equal shares by Jerome Zimmerman and by Security Management Co., Inc. ("Security"), a Georgia corporation having its principal office at 420 14th Street N.W., Atlanta, Ga. 30318. Security is engaged in real estate development and management, apartment and condominium construction and the sale of land. Mr. Zimmerman and Security may each be deemed to be a person "controlling" D-Z, as that term is defined in the

Exhibit B Annexed to Affidavit of Bruce R. Davis

applicable rules and regulations under the Securities Exchange Act of 1934, as amended.

Information concerning the present principal occupations, and the material occupations during the past ten years, of each of the officers and directors of D-Z is set forth in Schedule A hereto annexed. None of D-Z's directors or officers above named has during the past ten years been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors).

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this report approximately \$468,583 has been expended by D-Z for the purchase of the NJB Shares referred to in Item 5, below. \$254,783 thereof was paid out of D-Z's own funds, which funds were obtained by D-Z in a private placement of its 6% promissory notes, due March 31, 1975, which notes were sold to the persons and in the amounts set forth in Schedule B hereto annexed. The balance of the purchase cost was obtained by margin borrowings of \$3 per share from Cantor, Fitzgerald & Co., Inc., 232 No. Canon Drive, Beverly Hills, Calif., secured by pledge of the NJB Shares purchased.

ITEM 4. PURPOSE OF TRANSACTION.

In purchasing NJB Shares, it is the intention of D-Z to acquire a sufficient ownership interest in NJB to influence management decisions and, ultimately, to determine the management and policies of NJB. Depending upon future circumstances not now known, D-Z may take such action from time to time as it may deem appropriate, in the light of future developments, in order to obtain

Exhibit B Annexed to Affidavit of Bruce R. Davis

control of NJB and for the best interests of NJB. Such future actions may include:

(i) Acquisition of additional NJB Shares, either alone or in conjunction with others, through private or open market transactions, or through formal tender offer, when opportune situations do so arise (which acquisitions will depend upon the availability of NJB Shares on the open market, the willingness of holders of large blocks to sell their shares and general economic and market conditions);

(ii) Seeking representation on the Board of Trustees by means of solicitation of proxies or otherwise;

(iii) Joining with other shareholders, or other persons or groups, in a common effort to influence management of or obtain control of NJB; and/or

(iv) Seeking to change the investment advisory arrangements of NJB.

Should D-Z, alone or in conjunction with others, obtain control of NJB, it intends, subject to a study of all of NJB's assets and all other relevant circumstances then obtaining, to consider the possible disposition of certain assets of NJB and the effecting of changes in its lending policies with a view to improving the operating results of NJB and, subject to further review of NJB's assets and all other relevant circumstances, D-Z believes it may then be desirable to recommend one or more of the following:

(a) Discontinuing the status of NJB as a real estate investment trust (unless and until it is determined to effect such discontinuance, it is not the intention of D-Z to take any action which would jeopardize NJB's status as a real estate investment trust

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under the applicable provisions of the Internal Revenue Code, as amended);

(b) If a study proves that a combination may be effected upon appropriate terms in the best interest of all parties concerned, to effect a merger, consolidation or other combination of NJB with D-Z and/or with Security; and/or

(c) The acquisition by NJB of other real estate investment trusts by purchase, merger or otherwise on such terms as may be in the best interests of NJB and its shareholders (although it should be noted that D-Z does not have any present plans or proposals to that end, nor has management of D-Z determined which, if any, other such trusts might be so acquired).

Except as mentioned above, D-Z has no present intention, nor has it in any event formulated any specific plan or proposal, to liquidate NJB or to make any major change in its business or structure.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

As a result of purchases made prior to and on April 23, 1974, D-Z became the beneficial owner on that date of 65,600 NJB Shares, representing approximately 5.14% of the total number of shares (1,276,053) which are reported by NJB in its Annual Report on Form 10-K for the year ended November 30, 1973 as outstanding on November 30, 1973. Except for the NJB Shares described in the table below, D-Z does not own beneficially, nor does it have the right to acquire, directly or indirectly, any NJB Shares.

During the last sixty (60) days, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB

Exhibit B Annexed to Affidavit of Bruce R. Davis

Shares other than purchased, as follows:

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19	1,000
April 22	4,600
April 23	60,000
April 26	5,400
May 2	200

Except for the purchase made on April 23, which was over the counter, all of the above purchases were made on the American Stock Exchange.

ITEM 6. CONTRACTS, ARRANGEMENTS, OR UNDERSTANDINGS WITH RESPECT TO SECURITIES OF THE ISSUER.

Neither D-Z nor any of its officers or directors is a party to any contracts, arrangements or understandings with any person with respect to any securities of NJB, except that Cantor, Fitzgerald & Co., Inc. has been retained to render certain services in connection with D-Z's purchases of NJB Shares, for which it is to receive a fee of \$30,000 plus out-of-pocket expenses which are at present estimated at approximately \$3,000. In addition, Cantor, Fitzgerald & Co., Inc., as an exclusive purchasing agent, will receive a fee equal to 5% of the purchase price payable in respect of all NJB Shares purchased on behalf of D-Z, and any brokerage commissions payable will be paid out of that fee.

ITEM 7. PERSONS RETAINED, EMPLOYED OR TO BE COMPENSATED.

Not applicable.

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Exhibit B Annexed to Affidavit of Bruce R. Davis

ITEM B. MATERIAL TO BE FILED AS EXHIBIT.

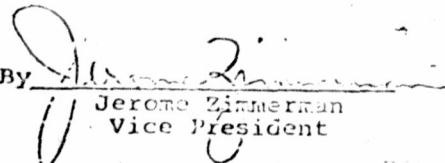
Letter Agreement dated April 25, 1974 between Security
and Cantor, Fitzgerald & Co., Inc.

SIGNATURE

The undersigned corporation certifies that to the best
of its knowledge and belief the information set forth in this
statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By


Jerome Zimmerman
Vice President

May 3, 1974

Exhibit B Annexed to Affidavit of Bruce R. Davis

SCHEDULE A

Information regarding the present principal occupations and the material occupations for the past ten years of the officers and directors of D-Z Investment Company is as follows:

Bruce R. Davis: President and Director of D-Z; Chairman of the Board of Security Management Co., Inc. (since October 1969); Executive Vice President of Pioneer Development Corporation, Atlanta, Ga. (October 1968 to October 1969); Secretary of Security Development and Investment Company (October 1963 to October 1968).

Jerome Zimmerman: Vice President and Director of D-Z; President of Apollo Forest Products, Inc. (lumber distributor) (since February 1973); Private Investor (June 1969 to February 1973); General Manager of Delmar Division, U. S. Plywood Corp. (cabinet manufacturers) (September 1966 to June 1969) and President of Delmar Cabinet Co., Inc. (September 1960 to September 1966); President of Union Lumber Co., Inc. (lumber manufacturers and distributors) (December 1948 to September 1966); President of F & L Services, Inc. (apartment management) (since March 1966).

Edna M. Becker: Treasurer, Secretary and Director of D-Z; President of Security Management Co., Inc. (since 1972); President of Dixie Shoe Corporation, Eufaula, Ala. (shoe manufacturing) (since 1963); Partner of R & S Management Co., Atlanta, Ga. (real estate management) (since 1967); President of Miracle City Stores Co., Huntsville, Ala. (shopping center) (since 1962).

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Saul Reel eg: Vice President and Director of D-Z; Director of Security Management Co., Inc. (since 1973); Secretary and Treasurer, Dixie Shoe Corporation (since 1963) and of Miracle City Stores Co. (since 1962); Partner of R & S Management Co., Atlanta, Ga. (since 1967); President of First Fidelity Realty Group, Ltd. (real estate broker) (since 1973); Southeastern Regional real estate manager, Marx Realty & Improvement Co., Inc. Atlanta, Ga. (1956 to 1973).

Exhibit B Annexed to Affidavit of Bruce R. Davis

SCHEDULE B

Information regarding the purchasers of the 6% promissory notes referred to in Item 3 hereof is as follows:

<u>NAME AND ADDRESS OF PURCHASER</u>	<u>PRINCIPAL AMOUNT</u>
Security Management Co., Inc. 400 Fourteenth St. N. W. Atlanta, Georgia 30318	\$ 50,000
Jerome Zimmerman 1260 Foster Street, N. W. Atlanta, Georgia	50,000
Bernard Kroll 100 Colony Square Suite 2300 Atlanta, Georgia	50,000
Max Sophier 2575 Peachtree St., N. E. Atlanta, Georgia 30305	50,000
Harold Levow 1225 Mt. Paran Road, N. W. Atlanta, Georgia	50,000
Harold E. Levin, M. D. 1293 Peachtree St., N. E. Atlanta, Georgia 30309	50,000
Harvey Jacobson 3236 E. Wood Valley Rd., N. W. Atlanta, Georgia 30327	50,000

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Exhibit B Annexed to Affidavit of Mr. R. Davis

Center, Fitzgerald & Co., Inc.
INVESTMENT BANKERS

WILLIAM F. HILLER
SENIOR VICE PRESIDENT

1345 AVE. OF THE AMERICAS
NEW YORK, N. Y. 10013
(212) 641-6400

April 25, 1974

Mr. Bruce R. Davis
Chairman of the Board
Security Management Co., Inc.
420 Fourteenth Street, N.W.
Atlanta, Georgia 30318

Dear Bruce:

This letter is intended by the parties to replace prior agreements evidenced by letters of March 22, 1974 and April 16, 1974, and the signatures to this letter will constitute a rescission of said prior agreements.

This firm shall act on your behalf (or on behalf of your assignee corporation) to perform certain services relating to an intent to acquire an interest in a publicly held real estate related company (the "Company").

In pursuance of that end we will use our best efforts to obtain funds sufficient to permit purchases of shares of the Company on margin (provided such shares are marginable in accordance with applicable rules and regulations) to consummate the transaction or transactions contemplated hereby. In the event you or your said assignee should purchase shares of the Company we shall receive, as an exclusive purchasing agent, a fee equal to 5% of the net purchase price payable in respect of all such shares purchased on your behalf. Said fees shall be payable as in the ordinary course of any securities transactions. You or your assignee shall have no other financial obligation for commission to us or to any broker as a result of such purchases.

RECEIVED

APR 26 1974

NEW YORK

SECURITY MANAGEMENT CO.

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under Fitzgerald & Co., Inc.

April 25, 1974

In addition to the above you shall pay us a fee of \$30,000 at the rate of \$5,000 a month, plus all direct expenses incurred on your behalf after consultation with you or any expenditures aggregating \$1,000 or more. By way of illustration but without intending to limit the nature of such expenses, it is anticipated that such direct expenses shall be comprised of travel, legal, investigatory and similar out of pocket expenses. We have to date expended certain amounts on your behalf and as a nonaccountable reimbursement for such expenses, you shall pay us the sum of \$1,000.

In the event that we are unable to obtain margin to consummate the transactions contemplated hereby, you or your assignee may terminate this agreement on written notice, and we shall not be entitled to either the 5% fee on purchases after such termination or to any balance of the \$30,000 fee which has not become payable prior to such termination.

We make no warranties or representation regarding the accuracy and completeness of information supplied by us about the Company or any other concern in which you may express any interest.

If the above accurately sets forth our understanding, please signify your agreement and acceptance by signing two copies of this letter.

Very truly yours,

William P. Miller

William P. Miller
Senior Vice President

AGREED TO AND ACCEPTED BY:
SECURITY MANAGEMENT CO., INC.

Bruce R. Davis

Bruce R. Davis,
Chairman

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Exhibit B Annexed to Affidavit of Bruce R. Davis

I, the undersigned, Secretary of D-Z Investment Company, hereby certify the following to be a true and correct copy of a resolution duly adopted by the Board of Directors of said Corporation by unanimous written consent without a meeting on the 24 day of April, 1974, and that the same has not in any way been modified, amended, or revoked, and remains in full force and effect:

RESOLVED, that the President or any Vice President of this Corporation be and each hereby is authorized to sign on behalf of the Corporation and to file with the Securities and Exchange Commission any and all such documents, including an Information Statement on Schedule 13D and one or more amendments thereto, as may be necessary or appropriate pursuant to the Securities Exchange Act of 1934, as amended, in connection with the purchase by or on behalf of this Corporation of shares of beneficial interest of NJB Prime Investors, or in connection with the ownership of such shares, hereby ratifying and confirming all that any such officer may hereafter do in the premises.

I further certify that the persons named below now occupy the offices set forth opposite their names:

<u>NAME</u>	<u>OFFICE</u>
Bruce R. Davis	President
Saul Becker	Vice President
Jerome Zimmerman	Vice President
Ralph M. Becker	Secretary/Treasurer

WITNESS my signature and the seal of said Corporation, this 26 day of April, 1974.

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SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

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MAY 22 1974

AMENDMENT NO. 1

to

SCHEDULE 13D

U.S. SECURITIES & EXCHANGE COMMISSION

Pursuant to Section 13 (d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

15B PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-E INVESTMENT COMPANY
420 14th Street N. W.
Atlanta, Georgia 30318

Address copies of all communications to:

JOSEPH B. RUSSELL, ESQ.
Robin Wachtel Baum & Levin
593 Madison Avenue
New York, N. Y. 10022

Enclosing Items 3 and 5, and Schedule B Annexed

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Exhibit B Annexed to Affidavit of Bruce R. Davis

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this report approximately \$519,036 has been expended by D-Z for the purchase of the NJB Shares referred to in Item 5, below. \$265,536 thereof was paid out of D-Z's own funds, which funds were obtained by D-Z in a private placement of its 6% promissory notes, due March 31, 1975, which notes were sold to the persons and in the amounts set forth in Schedule B hereto annexed. The balance of the purchase cost was obtained by margin borrowings of \$3 per share from Cantor, Fitzgerald & Co., Inc., 232 No. Canon Drive, Beverly Hills, California, secured by pledge of the NJB Shares purchased.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

As a result of purchases made prior to and on April 23, 1974, D-Z became the beneficial owner on that date of 65,600 NJB Shares, representing approximately 5.14% of the total number of shares (1,276,053) which are reported by NJB in its Annual Report on Form 10-K for the year ended November 30, 1973 as outstanding on November 30, 1973. Except for the NJB Shares described in the table below, D-Z does not own beneficially, nor does it have the right to acquire, directly or indirectly, any NJB Shares.

During the sixty (60) days preceding the filing of the statement to which this amendment relates, and since such filing, neither D-Z nor any person affiliated with D-Z has effected any

Exhibit B Annexed to Affidavit of Bruce R. Davis

transaction in NJB Shares other than purchases, as follows:

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19	1,000
April 22	4,600
April 23	60,000
April 26	5,400
May 2	200
May 6	3,300
May 10	900
May 14	2,000
May 16	1,200
TOTAL	<u>78,500</u>

Except for the purchase made on April 23, which was over the counter, all of the above purchases were made on the American Stock Exchange.

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct:

D-Z INVESTMENT COMPANY

By /s/ Bruce R. Davis
Bruce R. Davis
President

MAY 21, 1974

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Exhibit B Annexed to Affidavit of Bruce R. Davis

SCHEDULE B

Information regarding the purchasers of the 6% promissory notes referred to in Item 3 hereof is as follows:

<u>NAME AND ADDRESS OF PURCHASER</u>	<u>PRINCIPAL AMOUNT</u>
Security Management Co., Inc. 200 Fourteenth St., N. W. Atlanta, Georgia 30318	\$ 50,000
Jerome Zimmerman 1260 Porter Street, N.W. Atlanta, Georgia	50,000
Bernard Kroll 100 Colony Square Suite 2300 Atlanta, Georgia	100,000
Max Sophier 2575 Peachtree St., N.E. Atlanta, Georgia 30305	50,000
Harold Levow 1235 Mt. Paran Road, N. W. Atlanta, Georgia	50,000
Harold B. Levin, M. D. 1293 Peachtree St., N. E. Atlanta, Georgia 30309	50,000
Harvey Jacobson 3236 E. Wood Valley Rd., N. W. Atlanta, Georgia 30327	50,000
Seymour Weinberg Old Ivy Road, N. E. Atlanta, Georgia	50,000

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SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

REC'D - S.E.C.

JUN 4 1974

AMENDMENT NO. 2

to

SCHEDULE 13D

Pursuant to Section 13 (d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-2 Investment Company
420 14th Street N.W.
Atlanta, Georgia 30318

Address copies of all communications to:

Joseph B. Russell, Esq.
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

Attending Floor 3 and 5.

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ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this amendment, approximately \$684,200 has been expended by D-Z for the purchase of the NJB Shares referred to in Item 5, below. \$361,780 thereof was paid out of D-Z's own funds, which funds were obtained by D-Z in a private placement of its 6% promissory notes, due March 31, 1975, which notes were sold to the persons and in the amounts set forth in Schedule B hereto annexed. The balance of the purchase cost was obtained by margin borrowings of \$3 per share from Cantor, Fitzgerald & Co., Inc., 232 No. Canon Drive, Beverly Hills, California, secured by pledge of the NJB Shares purchased.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

As a result of purchases made prior to and on April 23, 1974, D-Z became the beneficial owner on that date of 65,600 NJB Shares, representing approximately 5.14% of the total number of shares (1,276,053) which are reported by NJB in its Annual Report on Form 10-K for the year ended November 30, 1973 as outstanding on November 30, 1973. Except for the NJB Shares described in the table below, D-Z does not own beneficially, nor does it have the right to acquire, directly or indirectly, any NJB Shares.

During the sixty (60) days preceding the filing of the statement to which this amendment relates, and since such filing, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB Shares other than purchases, as follows:

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Exhibit B Annexed to Affidavit of Bruce R. Davis

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19	1,000
April 22	4,500
April 23	60,000
April 26	5,400
May 2	200
May 6	3,200
May 10	900
May 14	2,000
May 16	1,200
May 24	19,000
May 28	10,000
TOTAL	<u>107,500</u>

Except for the purchase made on April 23, which was over the counter, all of the above purchases were made on the American Stock Exchange.

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By

Bruce R. Davis
Bruce R. Davis
President

June 3, 1974

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Exhibit B Annexed to Affidavit of Bruce R. Davis

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

AMENDMENT NO. 3

to

SCHEDULE 13D

Pursuant to Section 13(d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z Investment Company
420 14th Street N. W.
Atlanta, Georgia 30318

Address copies of all communications to:

Joseph B. Russell, Esq.
Rubin Wachtel Baum & Levin
520 Madison Avenue
New York, N. Y. 10022

Consisting of Pages 2 and 3, and Schedule B

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Exhibit B Annexed to Affidavit of Bruce R. Davis

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this amendment, approximately \$991,330 has been expended by D-Z for the purchase of the 158,500 NJB Shares referred to in Item 5, below. Approximately \$532,160 thereof was paid out of D-Z's own funds, of which \$500,000 was obtained by D-Z in a private placement of its 6% promissory notes, due March 31, 1975, to the purchasers and in the amounts set forth in Schedule B, and \$75,000 was advanced by Bruce R. Davis. The balance of the purchase cost was obtained by margin borrowings from Cantor, Fitzgerald & Co., Inc., Beverly Hills, California, and from Ladenburg, Thalmann & Co., New York, N. Y., in each case (except for 5,400 shares purchased for cash) secured by pledge of the NJB Shares purchased through such broker.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

As a result of purchases made prior to and on April 23, 1974, D-Z became the beneficial owner on that date of 65,600 NJB Shares, representing approximately 5.14% of the total number of shares (1,276,053) reported by NJB in its Annual Report on Form 10-K for the year ended November 30, 1973 as outstanding on November 30, 1973. Except for the 158,500 NJB Shares referred to above and in the table below, D-Z does not own beneficially, nor does it have the right to acquire, directly or indirectly, any NJB Shares.

Following the filing of the statement to which this amendment relates, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB Shares, other than purchases, as follows:

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Exhibit B Annexed to Affidavit of Bruce R. Davis

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19 - May 28 (previously reported)	107,500
May 22	200
June 5	500
June 6	500
June 14	6,900
June 17	3,100
June 18	3,000
June 26	3,000
June 27	8,700
July 1	2,200
July 2	10,000
July 3	12,900
TOTAL	<u>158,500</u>

Except for the purchases of 60,000 shares on April 23 and 7,200 shares on July 3, each of which was over the counter, all of the above purchases were made on the American Stock Exchange.

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By *Bruce R. Davis*
Bruce R. Davis
President

July 8, 1974

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Exhibit B Annexed to Affidavit of Bruce R. Davis

SCHEDULE B

Information regarding the purchasers of the 6% promissory notes referred to in item 3 hereof is as follows:

<u>NAME AND ADDRESS OF PURCHASER</u>	<u>PRINCIPAL AMOUNT</u>
Security Management Co., Inc. 420 Fourteenth St., N. W. Atlanta, Georgia 30318	\$ 50,000
Jerome Zimmerman 1260 Foster Street, N. W. Atlanta, Georgia	50,000
Edward Kroll 100 Colony Square Suite 2300 Atlanta, Georgia	100,000
Max Sophier 2575 Peachtree St., N. E. Atlanta, Georgia 30305	50,000
Harold Levow 1235 Mt. Paran Road, N. W. Atlanta, Georgia	50,000
Harold B. Levin, M. D. 1293 Peachtree St., N. E. Atlanta, Georgia 30309	50,000
Harvey Jacobson 3236 E. Wood Valley Rd., N. W. Atlanta, Georgia 30327	50,000
Seymour Weinberg Old Ivy Road, N. E. Atlanta, Georgia	50,000
Ronald D. Feinman 5210 London Drive, N. W. Atlanta, Georgia	50,000

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Exhibit B Annexed to Affidavit of Bruce R. Davis

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

Handwritten: Put in
JUL 27 1971

AMENDMENT NO. 4

to

SCHEDULE 13D

Pursuant to Section 13(d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z Investment Company
420 14th Street N.W.
Atlanta, Georgia 30318

Address copies of all communications to:

Joseph B. Russell, Esq.
Rubin Wachtel, Esq. & Levin
508 Madison Avenue
New York, N. Y. 10022

7. Submitting Items 3 and 4.

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Exhibit B Annexed to Affidavit of Bruce R. Davis

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this amendment, approximately \$999,230 has been expended by D-Z for the purchase of the 160,000 NJB Shares referred to in Item 5 below. Approximately \$519,170 thereof was paid out of D-Z's own funds, and the balance of the purchase cost was obtained by margin borrowings from Cantor, Fitzgerald & Co., Inc., Beverly Hills, California, and from Ladenburg, Thalmann & Co., New York, N. Y., in each case secured by pledge of the NJB Shares purchased on margin through such broker; an additional \$62,500 was borrowed from a bank and is secured by pledge of 25,000 NJB Shares which are not otherwise encumbered.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

Following the filing of the statement to which this amendment relates, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB Shares, other than purchases, as follows:

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19 - May 28 (previously reported)	107,500
May 22	200
June 5	500
June 6	500
June 14	6,900
June 17	3,100
June 18	3,000
June 26	3,000
June 27	8,700
July 1	2,200
July 2	10,000
July 3	12,900
July 12	1,100
July 15	400
	<hr/>
Total	160,000
	<hr/>

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Exhibit B Annexed to Affidavit of Bruce R. Davis

All of the above purchases were made on the American Stock Exchange, except for the following portions thereof made over the counter:

<u>Date of Purchase</u>	<u>Number of Shares</u>
April 23, 1974	60,000
May 21, 1974	15,000
May 28, 1974	10,000
June 14, 1974	5,000
July 3, 1974	7,200

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By B. R. Davis
Bruce R. Davis,
President

July 17, 1974

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Exhibit B Annexed to Affidavit of Bruce R. Davis

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

REC'D - S.E.C.

JUL 22 1974

AMENDMENT NO. 5

to

SCHEDULE 13D

Pursuant to Section 13(3) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB FRIED INVESTORS
550 Clifton Avenue
Clifton, New Jersey 07013

Filed By: .

D-Z Investment Company
401 14th Street N. W.
Atlanta, Georgia 30312

Address copies of all communications to:

Joseph B. Russell, Esq.
Elin Wachtel Baum & Levin
508 Madison Avenue
New York, N. Y. 10022

See also Exhibits B and C, and D, and E, and F, and G.

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Exhibit B Annexed to Affidavit of Bruce R. Davis

ITEM 4. SOURCE AND SOURCE OF FUNDS OR OTHER CONSIDERATION.

As of the date of this amendment, approximately \$1,022,306 has been expended by D-Z for the purchase of the 164,000 LMB Shares referred to in Item 1 below. Approximately \$562,245 thereof was paid out on D-Z's own funds, of which \$75,000 was advanced by Bruce R. Davis and \$500,000 was obtained in a private placement of its 6% preferred, notes, due March 31, 1975, sold to the persons and in the amounts set forth in Schedule B annexed. The balance of the purchase cost was obtained by margin borrowings from Cantor, Fitzgerald & Co., Inc., Beverly Hills, California, and from Ladenburg, Thalmann & Co., New York, N. Y., in each case secured by pledge of the LMB Shares purchased on margin through such broker; an additional \$62,500 was borrowed from a bank and is secured by pledge of 25,000 LMB Shares which are not otherwise encumbered.

ITEM 5. INVESTMENT IN SECURITIES OF THE ISSUER.

Following the filing of the statement to which this amendment relates, neither D-Z nor any person affiliated with D-Z has effected any transaction in LMB Shares, other than purchases, as follows:

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19 - July 15 (previously reported)	160,000
July 16	4,000*
TOTAL	<u>164,000</u>

* Purchased on American Stock Exchange.

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By Bruce R. Davis
President

July 1, 1974

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Exhibit B Annexed to Affidavit of Bruce R. Davis

SCHEDULE B

The purchasers of the 6% promissory notes referred to in Item 3 hereon are as follows:

<u>NAME AND ADDRESS OF PURCHASER</u>	<u>PRINCIPAL AMOUNT</u>
Security Management Co., Inc. 420 Fourteenth St., N.W. Atlanta, Georgia 30312	\$ 50,000
Jerome Zimmerman 1260 Foster Street, N.W. Atlanta, Georgia	50,000
Bernard Kroll* 100 Colony Square Suite 2300 Atlanta, Georgia	100,000
Max Sophier 2575 Peachtree St., N. E. Atlanta, Georgia 30305	50,000
Harold Levow 1235 Mt. Paran Road, N. W. Atlanta, Georgia	50,000
Harold B. Levin, M. D. 1293 Peachtree St., N. E. Atlanta, Georgia 30309	50,000
Harvey Jacobson 3236 E. Wood Valley Rd., N. W. Atlanta, Georgia 30327	50,000
Seymour Weinberg Old Ivy Road, N. E. Atlanta, Georgia	50,000
Ronald B. Feinman 5310 London Drive, N. W. Atlanta, Georgia	50,000

* As nominee for a joint venture in which Mr. Kroll holds a 37.5% beneficial interest. The remaining interests are held by Morris Socoloff, 4615 Mt. Paran Parkway, N. W., Atlanta, Ga. (50%) and Jack L. Rothner, 5200 Mt. Vernon Parkway, N. W., Atlanta, Ga. (12.5%).

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Exhibit B Annexed to Affidavit of Bruce R. Davis

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

RECD & S.E.C.

JUL 25 1974

AMENDMENT NO. 6

to

SCHEDULE 13D

Pursuant to Section 13(d) of the
Securities Exchange Act of 1934

Information Statement Relating to
Beneficial Ownership of Shares of
Beneficial Interest of

NJB PRIME INVESTORS
950 Clifton Avenue
Clifton, New Jersey 07013

Filed By:

D-Z Investment Company
420 14th Street N.W.
Atlanta, Georgia 30318

Address copies of all communications to:

Joseph B. Russell, Esq.
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

Attending Items 3 and 5, and Schedule B.

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Exhibit B Annexed to Affidavit of Bruce R. Davis

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

As of the date of this amendment, approximately \$1,031,856 has been expended by D-Z for the purchase of the 166,000 NJB Shares referred to in Item 5 below. Approximately \$553,796 thereof was paid out of D-Z's own funds, of which \$75,000 was advanced by Bruce R. Davis and \$512,500 was obtained in a private placement of its 6% promissory notes, due March 31, 1975, sold to the persons and in the amounts set forth in Schedule B annexed. The balance of the purchase cost was obtained by margin borrowings from Cantor, Fitzgerald & Co., Inc., Beverly Hills, California, and from Ladenburg, Thalmann & Co., New York, N. Y., in each case secured by pledge of the NJB Shares purchased on margin through such broker; an additional \$62,500 was borrowed from a bank and is secured by pledge of 25,000 NJB Shares which are not otherwise encumbered.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

Following the filing of the statement to which this amendment relates, neither D-Z nor any person affiliated with D-Z has effected any transaction in NJB Shares, other than purchases, as follows:

<u>Date of Purchase</u> (1974)	<u>Number of Shares</u>
April 19 - July 16 (previously reported)	164,000
July 17	2,000*
TOTAL	<u>166,000</u>

* Purchased on American Stock Exchange.

SIGNATURE

The undersigned corporation certifies that to the best of its knowledge and belief the information set forth in this Amendment to its statement is true, complete and correct.

D-Z INVESTMENT COMPANY

By Bruce R. Davis
Bruce R. Davis, President

Exhibit B Annexed to Affidavit of Bruce R. Davis

ADDITION TO

SCHEDULE B

The purchasers of the 6% promissory notes referred to in Item 3 hereof include all those heretofore included in Schedule B, plus one other person, as follows:

NAME AND ADDRESS OF PURCHASERPRINCIPAL AMOUNT

Samuel Skriloff
1530 Palisades Avenue
Fort Lee, N. J. 07024

\$12,500

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AFFIDAVIT OF JOSEPH B. RUSSELL IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

D-Z INVESTMENT COMPANY, :

Plaintiff, :

-against- :

ROBERT E. HOLLOWAY, MELVIN S. TAUB, :

MAURICE J. BRICK, PETER E. SIMON, :

NORMAN BRASSLER, CHARLES GILLER, :

HERBERT E. HARPER, DR. GORDON MCKINLEY, :

JAMES R. MOSELEY, III, JACK G. TAYLOR, :

DALLAS S. TOWNSEND, JR. and NJB PRIME :

INVESTORS, :

Defendants, :

-and- :

SECURITY MANAGEMENT CO., INC., CANTOR, :

FITZGERALD & CO., INC., BRUCE R. DAVIS, :

JEROME ZIMMERMAN, RALPH M. BECKER, SAUL :

BECKER, BERNARD KROLL, MAX SOPHIER, :

HAROLD LEVOW, HAROLD B. LEVIN, HARVEY :

JACOBSON, SEYMOUR WEINBERG and RONALD :

D. FEINMAN, :

Additional Defendants :

to Counterclaims. :

-----x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

JOSEPH B. RUSSELL, being duly sworn, deposes and says:

1. I am a member of the firm of Rubin Wachtel Baum & Levin, attorneys for D-Z Investment Company ("D-Z"), plaintiff in this action. I submit this affidavit in opposition to the motion of the individual defendants who are the Trustees of a

Massachusetts business trust called NJB Prime Investors ("NJB"), which seeks to enjoin plaintiff from purchasing shares of NJB, from soliciting consents to the call of a special meeting of shareholders of NJB, and from voting or exercising any other ownership rights in the shares of NJB which plaintiff owns.

2. I am a member of the Bar of the State of New York and of this Court. For more than the past 18 years, I have specialized in federal securities law. In that capacity, I have prepared and caused to be filed with the Securities and Exchange Commission ("SEC") and with various stock exchanges a great number of registration statements, reports, listing applications, proxy statements, exchange offers, tender offers, and other disclosure documents. Never in all that time have I permitted a document prepared by me or under my supervision to be filed which did not, to the best of my knowledge and experience, reflect the most diligent effort to provide full and accurate disclosure, comply in all respects with the requirements of applicable law, and satisfy the highest professional standards.

3. My name appears on the cover page of the Schedule 13D which plaintiff duly and timely filed. I am the person principally responsible for its preparation. I was fully aware of the statutory and regulatory framework out of which that disclosure document arose, and I sought at all times to satisfy myself that the requisite disclosure standards were met.

4. I have read and considered the charges made by defen-

dants that plaintiff's Schedule 13D is "egregiously false and incomplete" (Kantor Aff., ¶2(a), p.2). In truth, however, it is defendants' charges which are false, and it is their citations to portions of plaintiff's Schedule 13D which are incomplete. I submit that plaintiff's Schedule 13D is in all material respects true and complete, and that in reality defendants' counter-attack upon plaintiff's complaint that defendants have violated Section 14(a) of the Securities Exchange Act of 1934 ("1934 Act") merely represents the irresponsibly shabby reflex act of an entrenched management which is suddenly called to account and forced to contemplate the prospect of losing its sinecure. Defendants show no restraint in their counter-attack. No matter how wild the charge may be, they hurl it at plaintiff, for plaintiff has committed the one cardinal sin which defendants can under no circumstances forgive, to wit, plaintiff has clearly and unambiguously announced its intention "to acquire a sufficient ownership interest in NJB to influence management decisions and, ultimately, to determine the management and policies of NJB" (Schedule 13D, p. 2).

5. In their desire to ward off ouster from office, defendants insist, without basis, that plaintiff's Schedule 13D is so false that plaintiff should be treated as an outcast and not be permitted to proceed in accordance with its announced intention. Thus, they accuse plaintiff of conduct "which is a virtual catalogue of violations of the Federal securities laws" (Kantor Supp. Aff., ¶2, p. 2). Defendants' resort to mud-slinging was not

Affidavit of Joseph B. Russell

diminished in the slightest by the facts, which must surely have been known to them, that they have no standing to complain of the "violations" which they so piously assert and that in any event such "violations", even if they do exist, are not required to be disclosed in a Schedule 13D filed pursuant to Section 13(d) of the 1934 Act.

6. Incredibly, defendants even accuse plaintiff of not "candidly setting forth D-Z's intention to obtain control of NJB" (Kantor Aff., ¶20, p. 14). How plaintiff's intent could have been stated more clearly than as quoted above is beyond me. Indeed, had the Schedule 13D been prepared in the manner which defendants urge, the document would have been replete with irrelevancies and, far worse, with idle speculation, irresponsible prognostications and downright falsehoods. It is obvious that no Schedule 13D prepared by plaintiff would have been to defendants' satisfaction, but the document which they profess plaintiff should have prepared would surely have been a false document, and one which would have perverted rather than served the Congressional purpose which gave rise to the enactment of Section 13(d) of the 1934 Act.

7. In preparing the Schedule 13D I drew a sharp distinction, consistent with my understanding of the governing legal principles, between a Schedule 13D which is filed as a disclosure document under Section 13(d) of the 1934 Act, in the case of the acquisition of a 5% equity interest, and the far more extensive disclosure requirements for a Schedule 13D which is filed as a

selling document in connection with "requests or invitations for tenders". In the latter case, Item 8 of Schedule 13D requires that there be filed as exhibits thereto all documents used in making the tender offer. These documents are broad and extensive disclosure documents. However, no corresponding type of document is required when filing a Schedule 13D pursuant to Section 13(d) of the 1934 Act since no one is being solicited to sell by such Schedule. This Schedule is almost simply a form with specified items to be answered truthfully; information not requested by such specified items need not be volunteered except insofar as it may be required to clarify what would otherwise be partial truths.

8. In enacting the Williams Act, Congress explicitly authorized the SEC to require the disclosure of "such ... information ... as [is] necessary or appropriate in the public interest or for the protection of investors". Having been granted rule-making power by Congress within a reasonably clear statutory framework, the SEC promulgated Regulation 13D, relating to acquisitions of a specified magnitude, and Regulation 14D, relating to tender offers, while adopting a single form -- Schedule 13D -- which it intended to do double duty, serving both. Rule 13d-1, which is part of Regulation 13D, requires the filing of "a statement containing the information required by Schedule 13D", whereas Rule 14d-1, part of Regulation 14D, requires the filing of "a statement containing the information and exhibits required by Schedule 13D" [emphasis added]. Those exhibits are prescribed by Item 8 and

consist of "requests or invitations for tenders" and the like. Such requests or invitations may not contain, pursuant to Section 14(e) of the 1934 Act, "any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made ... not misleading"

9. There is a sharp distinction between the disclosure requirements called for by the two separate and distinct Schedules 13D. I would deem it unnecessary and improper to supply information above and beyond that which is specifically requested by the SEC in a Schedule 13D relating to a transaction covered by Section 13(d) of the 1934 Act, to wit, the "information" asked for by the various Items of Schedule 13D; no "exhibits" of the nature described in Item 8 are called for in such a case. However, when filing a Schedule 13D in connection with a tender offer, to which the provisions of Sections 14(d) and 14(e) of the 1934 Act apply instead, I would, pursuant to Item 8 of the Schedule 13D, by annexing as exhibits the offering material called for therein, ipso facto necessarily furnish all information which I would regard as material for an investor to know in connection with a tender offer. In other words, the disclosure standards of Section 14(e) applicable to tender offers and requiring the disclosure of all material information are incorporated into Schedule 13D when a tender offer is involved by the requirement of Rule 14d-1 that the "exhibits" called for by Schedule 13D be supplied, and by the requirement of Item 8, Schedule 13D that the offering materials be annexed as exhibits.

10. Accordingly, in materials relating to a tender offer, I would most certainly include, for example, information concerning pending indictments, or material administrative proceedings, or material civil litigation past, present or threatened, although such information is not requested by Item 2(e) of Schedule 13D, which asks only that information be set forth regarding criminal convictions during the past ten years. Such additional disclosure would be made via Item 8 and would appear in the offering materials. However, when no tender offer is involved, such additional disclosure is neither necessary nor proper. The SEC did not request that it be furnished on a Schedule 13D filed pursuant to Section 13(d) of the 1934 Act. With those distinctions in mind, and satisfied that D-Z's activities did not amount to a tender offer, "creeping" or otherwise, I prepared D-Z's Schedule 13D.

A. D-Z Has Not Engaged in a Tender Offer,
and Accordingly, its Schedule 13D Filings
Contain All Required Information.

11. Defendants have resorted to a tired, shopworn strategy. They have created a straw man and have then proceeded to knock it down. The straw man in this case is "tender offer". The demolition of that straw man is effected by defendants' lengthy and dreary recitation of the manner in which the assumed "tender offer" did not comply with Section 14(d) of the 1934 Act. Indeed, defendants spend so much time in elaborating the deficiencies in plaintiff's "tender offer" that one almost loses sight of the essential and determinative fact in this case: Plaintiff did not make a tender offer, formal or otherwise.

Affidavit of Joseph B. Russell

12. Plaintiff is the owner of 166,000 shares of beneficial interest of NJB, which represents approximately 13% of the 1,276,053 shares which NJB reported to be outstanding in its annual report for the year ended November 30, 1973. As reported by plaintiff in its Schedule 13D dated May 3, 1974 (and the six amendments thereto which were filed to reflect additional purchases and/or additional sources of funds to be used for such purchases), plaintiff acquired its shares as follows:

<u>DATE OF PURCHASE</u> <u>(1974)</u>	<u>NUMBER OF</u> <u>SHARES</u>	<u>WHERE</u> <u>PURCHASED</u>
4/19	1,000	American Stock Exchange
4/22	4,600	" " "
4/23	60,000	Over the Counter
4/26	5,400	American Stock Exchange
5/ 2	200	" " "
5/ 6	3,200	" " "
5/10	900	" " "
5/14	2,000	" " "
5/16	1,200	" " "
5/22	200	" " "
5/24	4,000	" " "
5/24	15,000	Over the Counter
5/28	10,000	" " "
6/ 5	500	American Stock Exchange
6/ 6	500	" " "
6/14	1,900	" " "
6/14	5,000	Over the Counter
6/17	3,100	American Stock Exchange
6/18	3,000	" " "
6/26	3,000	" " "
6/27	8,700	" " "
7/ 1	2,200	" " "
7/ 2	10,000	" " "
7/ 3	5,700	" " "
7/ 3	7,200	Over the Counter
7/12	1,100	American Stock Exchange
7/15	400	" " "
7/16	4,000	" " "
7/17	2,000	" " "
Total Number of Shares Purchased	<u>166,000</u>	

It is defendants' contention that the aforesaid purchases ipso facto constitute a tender offer, thus making plaintiff subject to the statutes regulating tender offers. If such were the case, a person could never seek to acquire control of a corporation through open market purchases. Tender offers are subject to the provisions of Section 14(d) of the 1934 Act which include, among other things, the right of any person tendering shares to withdraw such shares during a seven-day period (Section 14(d)(5)), the requirement that there be pro-ration of purchases from all willing sellers (Section 14(d)(6)), and finally, the requirement in Section 14(d)(7) that all persons who tender their shares receive the best price which is paid for any of the shares. These requirements are literally impossible to satisfy when making open market purchases. Defendants, however, seek to obviate this difficulty by blithely suggesting that any plan to acquire control of a corporation by open market purchases becomes a "tender offer" and thereby such a plan is per se unlawful because the withdrawal requirements, the pro rata requirements, and the best price requirements, as mentioned above, cannot be satisfied when making open market purchases. It is patently a circular argument which feeds upon itself.

13. In a feeble attempt to establish that plaintiff's purchases, as aforesaid, have constituted a tender offer, defendants make the following charges at pages 21-24 of the Kantor Supplemental Affidavit. These allegations, it will be noted, are being made by defendants after they have taken all discovery which

they deemed necessary. If I understand Mr. Kantor, he seems to be saying that the following items result in a tender offer:

- (a) Systematic, extensive purchases of shares with the intent to gain control.
- (b) An intention to make a formal tender offer if the money is obtained for it.
- (c) Public announcements of plaintiff's intention to acquire control.*
- (d) Telephone solicitation of "almost two dozen" large shareholders.

This is the sum and substance of the "facts" which defendants have unearthed. From this, defendants argue that plaintiff's conduct "has the precise 'shareholder impact' of a formal tender offer and thus constitutes a 'tender offer' so as to bring into operation the requirements of the Williams Act...." (Kantor Supp. Aff., ¶28, p. 22). I leave for plaintiff's accompanying memorandum of law the demonstration that defendants' position is without any legal basis whatsoever. On the facts, however, I ask the Court to note that plaintiff's conduct had no "shareholder impact" in any way

* It is ironic that defendants argue on the one hand, when criticizing the Schedule 13D filing, that plaintiff failed to disclose adequately its intention to gain control of NBB, and on the other hand, when arguing that plaintiff's conduct amounts to a tender offer, that plaintiff has made "repeated public announcements" of its intention to gain control of NBB.

analogous to that of a formal tender offer. No shareholder was pressured into selling shares or making any hasty investment decision; there were no widespread solicitations of unsophisticated and unwary shareholders; there was neither any time limit nor a fixed price offered on a "take it or leave it" basis involved in any of the acquisitions made by plaintiff. Even the telephone calls made by William Schwartz in his effort to seek out some of the larger holdings which might be available for sale did not result in anyone being pressured or in any flurry of sales. His calls resulted only in one institution selling 5,000 shares and as testified to by Mr. Schwartz, that institution held out for a higher price than was initially offered by him. (Schwartz Deposition at pp. 49-50). Finally, as detailed in the affidavit of William P. Miller, senior vice president of Cantor, Fitzgerald & Co., Inc. ("CF"), plaintiff's purchases had no impact on the market price or trading volume in shares of NJB. Under the circumstances, the "shareholder impact" which defendants assert, is simply not present.

B. Defendants Have Failed to Establish
Any Inaccuracies, Misstatements, or
Omissions in D-Z's Schedule 13D.

14. In paragraph 19 of Kantor's July 19, 1974 affidavit, the charge is made that the Schedule 13D filing of D-Z is "a tissue of inaccuracies, misstatements and omissions". Eleven items are then enumerated in support of this assertion, but not a single one of those items stands up to examination. Kantor's Supplemental Affidavit of August 2, 1974, submitted after defen-

dants had taken the depositions of eleven people*, states, in the same bombastic manner, that discovery "has resulted in numerous important additional disclosures which cast new light on the unlawful scheme which plaintiff has formulated to gain control of NJB" (§3, p. 2). This discovery, plus "further analysis of prior discovery" has, according to Kantor, "disclosed additional highly relevant matter" (§3, p. 3). Yet, despite all the bluster and verbiage, the fact remains that there is nothing illegal or sinister in plaintiff's "scheme" to gain control of NJB, and that, try as they may, defendants have been unable to make out a case.

15. I shall respond to those portions of the charges contained in defendants' affidavits which are within my ken. The accompanying affidavits of Bruce R. Davis ("Davis"), president of D-Z, and of William P. Miller respond to the balance of the charges. I shall first deal seriatim with the eleven specific allegations set forth in paragraph 19 of Kantor's July 19, 1974 affidavit.

* Defendants examined the following people:

<u>Date (1974)</u>	<u>Name</u>
July 15	Jerome Zimmerman
July 16 and 17	Lawrence F. Orbe III
July 18	Dr. Harold B. Levin
July 19	Bernard Kroll
July 19	Max Sophier
July 22	Harold A. Levow
July 22	Harvey Jacobson
July 22 and 23	Bruce R. Davis
July 23	Dr. Seymour P. Weinberg
July 24	William P. Miller
July 24	William Schwartz

Affidavit of Joseph B. Russell

(1) Defendants charge that "in April 1974 ... D-Z ... had formulated a specific, carefully worked-out program ... to obtain control of NJB." However, the only "specific, carefully worked-out program" for the acquisition of control of NJB which is known to me to have existed involved the efforts of Davis, assisted by CF, to reach an understanding with CNA Financial Corp. or with an officer of an affiliate of CNA Financial Corp. Several officers and employees of CF participated in some of the discussions which led to the formulation of that "program". As Mr. Kantor well knows, those discussions broke off, and the "program" was abandoned, well before D-Z was organized and well before any purchases of any shares of NJB were made by or on behalf of D-Z.* Neither Schedule 13D nor the applicable statute, Section 13(d) of the 1934 Act, nor the provisions of Regulation 13D of the SEC, call for the disclosure of plans terminated, of hopes abandoned. Indeed, while disclosure of information concerning "contracts, arrangements or understandings" respecting any securities of the issuer is required by Item 6 of Schedule 13D, it cannot seriously be urged that "contracts" which have not been entered into, "arrangements" which do not exist or "understandings" which have never been arrived at should for any reason be disclosed.

(2) Defendants charge that in April 1974 D-Z had determined to achieve control of NJB "by purchasing approximately

* In paragraph 12 of Kantor's affidavit (p. 9), he concedes that "In mid-April CNA terminated the letter of intent and the proposed joint venture was abandoned."

300,000 shares of NJB." It is not true that D-Z had determined to purchase approximately 300,000 shares of NJB. What is true is that Davis and Jerome Zimmerman ("Zimmerman") discussed the possibility of raising up to a maximum of \$1,250,000 for D-Z from among Zimmerman's friends, which Zimmerman undertook to try to do. What is also true is that this amount, if obtained, and if used to buy shares on margin, could purchase approximately 300,000 shares (if the market price did not rise, if that number of shares were in fact available to be purchased, and if monies were not needed to defray the cost of a possible proxy contest and to pay legal fees and other expenses, etc.). The number 300,000 is the result of a mathematical calculation backward, nothing more. At no point did the purchase of 300,000 shares become a fixed goal, and, indeed, at no point has D-Z been financially capable of purchasing 300,000 shares of NJB. A statement that it had determined to buy that number of shares would accordingly have been highly misleading (and untrue, as well). Yet, that is the irresponsible type of "disclosure" which defendants now claim was required. I question their sincerity.

Moreover, even if plaintiff had made a determination that it intended to purchase approximately 300,000 shares of NJB, and was financially able to do so, I would not have deemed it necessary or appropriate to set that forth in its Schedule 13D. Neither Schedule 13D nor Section 13(d) of the 1934 Act nor Regulation 13D calls for a disclosure of the number of shares that a 5% beneficial owner may have determined to purchase. If plaintiff

were making a tender offer for a specified minimum number of shares, its offering materials would, of course, have had to recite that fact. Here, however, no tender offer was or is involved.

(3) and (4) Defendants' charges about plaintiff's supposed non-disclosures of its borrowings is without any substance. As noted above, plaintiff originally sought to raise up to a maximum of \$1,250,000 by selling its 6% notes ("Notes"). Item 3 of Schedule 13D requires disclosure of "the source and amount of funds or other consideration used or to be used [by plaintiff] in making the purchases, and if any part of ... [those funds are] borrowed or otherwise obtained for ... [that purpose]," the transaction must be described and the parties (other than banks lending money in the ordinary course) must be identified. Item 3 of D-Z's Schedule 13D describes with great particularity the sources and the amounts of the funds used and to be used by D-Z. Those sources were borrowings by the plaintiff from its stockholders and from the other individuals whose identities are fully disclosed in Schedule B to plaintiff's Schedule 13D, margin borrowings from named brokers, and a bank borrowing. The full amount of all monies borrowed from the persons named in Schedule B was in fact set forth, of course, despite the fact that less than all of it had been used in making purchases. D-Z's mere desire to borrow more money cannot, by any stretch of the imagination, be deemed a "transaction". It is wholly irrelevant, and not required to be disclosed, that D-Z may have wished to borrow more money than it did, or that it contemplated that at some future date the persons

from whom it had borrowed might be given an opportunity to acquire an equity interest in D-Z. This information is simply not called for by Item 3 or any other part of Schedule 13D, by Section 13(d) of the 1934 A or by Regulation 13D.

In Kantor's Supplemental Affidavit of August 2, 1974, he asserts that "FRC committed itself to loan \$2,700,000 to D-Z to finance a tender offer for 350,000 shares of the stock of NJB, \$5,000 being paid to FRC by D-Z to secure that commitment" (§8). Hammering the point harder, he repeats that "plaintiff had actually entered into an agreement with FRC pursuant to which FRC was to lend plaintiff \$2,700,000 to finance a formal tender offer for 350,000 NJB shares" (§10). In the light of defendants' professed concern for truth, candor and full disclosure, the language just quoted cries out for comparison with the documentary evidence which is annexed as Exhibit B (though erroneously referred to as Exhibit C) to such supplemental affidavit. A review of the entire contents of FRC's "commitment" letter establishes beyond peradventure that the description above quoted is inaccurate, distorted, and misleading beyond belief. Nowhere does FRC become obligated to advance one single cent to plaintiff; at no risk to itself, for a non-refundable door-opening fee of \$5,000, FRC undertook only to consider whether it would itself make a loan to D-Z, or obtain a loan for D-Z, on the terms outlined. Defendants are less than candid when they characterize so risk-free an undertaking as a commitment "to loan", whereby FRC "was to lend".

Affidavit of Joseph B. Russell

(5) Defendants are in error when they assert that D-Z's outstanding stock has been pledged to secure the repayment of its Notes. Although the Notes make reference to a deposit of such shares in escrow (see paragraph 13 of the form of Note, annexed as Exhibit 2 to plaintiff's private placement memorandum annexed to Kantor's affidavit), no escrow agreement has ever been entered into or signed, and no escrow has been created. However, even if that escrow had been created I would not deem it relevant or material Schedule 13D information. Nowhere in Schedule 13D is information requested concerning an escrow of the stock of the person filing the statement. Information is called for, by preliminary Note B to Schedule 13D, with respect to each officer and director of and each person controlling, D-Z, and that information has been given. Moreover, the identity of each noteholder has also been given. There are no secret interests in D-Z. Defendants are raising a tempest in a teapot.

(6) Whether the transactions whereby plaintiff offered and sold its Notes to a group of close personal friends of Zimmerman, Davis and Saul Becker were exempt from registration under the Securities Act of 1933, is of no relevance or materiality whatever to NJB or to the shareholders of NJB. Item 2(c) of Schedule 13D inquires about criminal convictions of any officer, director or controlling person of D-Z, and of D-Z itself, during the past ten years; had there been any such convictions, they would have been disclosed. However, that Item does not inquire about arrests or indictments which (for whatever reason) did not

lead to convictions; therefore, even if there had been any such arrests or indictments, they would not have been disclosed. In similar vein, neither that Item nor any other Item of Schedule 13D inquires about civil liabilities (arising out of alleged violations of the securities laws or otherwise) which may have been successfully or unsuccessfully asserted against any such person. A fortiori, there is no requirement that information be set forth concerning a contingent liability (not yet asserted) which might arise out of the violation (claimed by defendants, but not conceded by plaintiff) of the registration requirements of the Securities Act of 1933.

Furthermore, since in my opinion, neither Schedule 13D nor Section 13(d) of the 1934 Act nor Regulation 13D calls for it, if plaintiff had raised its funds by means of a public offering, registered under Section 5 of the Securities Act of 1933, I would not have deemed it appropriate to annex a copy of its prospectus to Schedule 13D and would not have done so. Similarly, I did not deem it appropriate to annex a copy of its private placement memorandum to its Schedule 13D and did not do so. Neither Item 3 relating to source of funds nor any other Item in Schedule 13D requires such disclosure, and, moreover, there is no legal basis upon which NJB's management can properly concern itself with the method whereby its shareholders have obtained their funds.

(7) Item 4 of plaintiff's Schedule 13D sets forth, in as much detail as I believed to be legally and factually appro-

Affidavit of Joseph B. Russell

priate, D-Z's plans, purposes and intentions, all of which were and remain dependent upon changing circumstances and circumstances not then or now known. It is clearly stated that

"[s]hould D-Z, alone or in conjunction with others, obtain control of NJB, it intends, subject to a study of all of NJB's assets and all other relevant circumstances then obtaining, to consider the possible disposition of certain assets of NJB and the effecting of changes in its lending policies with a view to improving the operating results of NJB and, subject to further review of NJB's assets and all other relevant circumstances, D-Z believes it may then be desirable to recommend one or more of the following: ...

"(b) if a study proves that a combination may be effected upon appropriate terms in the best interest of all the parties concerned, to effect a merger, consolidation or other combination of NJB with D-Z and/or Security [Management Co., Inc.]; ... [emphasis added]."

That expresses the sum and substance of plaintiff's intent, then and now, to effectuate a merger. No terms have been formulated, no ratios contemplated, no direction considered. How, in the face of the quoted language, Mr. Kantor can complain of non-disclosure, is utterly mystifying.

(8) The accompanying affidavit of Davis specifically denies and refutes the naked charge that D-Z intends to repay its investors with the assets of NJB. Moreover, the manner in which plaintiff intends to repay its investors is not called for by Item 3 or any other Item in Schedule 13D, and is simply not germane to any of the information that is called for by Schedule 13D, by

Section 13(d) of the 1934 Act or by Regulation 13D. If such information is required by a Schedule 13D, it could only be by Item 8 thereof, which relates to material for use in connection with a tender offer. As plaintiff's Schedule 13D was not filed in connection with any tender offer, but simply pursuant to Section 13(d) of the 1934 Act, the information does not come within any of the Items to which inquiry is directed.

(9) I have made diligent inquiry and am assured that D-Z had not, in fact, ever issued standing instructions to its broker to purchase every share of NJB it could get, and among the reasons why no disclosure is made of such an instruction is that it never existed. The accompanying affidavits of Davis and Miller explicitly deny defendants' allegation. Indeed, even Kantor, at one point, modifies his sweeping assertion by at least conceding that the "standing instructions" were "subject to certain price parameters" (¶18, p. 12). The actual facts appear in the aforesaid affidavits of Davis and Miller. Moreover, plaintiff's intentions with respect to the purchase of additional NJB shares were stated as clearly as could be in Item 4 of its Schedule 13D, from which again I quote:

"In purchasing NJB Shares, it is the intention of D-Z to acquire a sufficient ownership interest in NJB to influence management decisions and ultimately, to determine the management and policies of NJB. Depending upon future circumstances not now known, D-Z may take ... [appropriate action which may include] acquisition of additional NJB Shares, either alone or in conjunction with others, through private or open market transactions, or through formal tender offer, when opportune situations

Affidavit of Joseph B. Russell

to do so arise (which acquisitions will depend upon the availability of NJB Shares on the open market, the willingness of holders of large blocks to sell their shares and general economic and market conditions)." [emphasis added].

(10). Whether or not D-Z has authorized the solicitation of proxies for the call of a special meeting is devoid of any significance when considering the accuracy of plaintiff's Schedule 13D. Moreover, as Davis has stated in his accompanying affidavit, neither D-Z nor any person acting on its behalf has ever authorized the solicitation of proxies for the call of a special shareholders meeting of NJB. At a time when it appeared there was a possibility of its presenting a slate of opposition candidates for election as Trustees at NJB's annual meeting (the date of which was not then known*), or at an adjourned meeting, plaintiff retained the firm of Georgeson & Co.; that was essentially its sole act in the direction of soliciting proxies.

(11). Whether plaintiff is or is not exempt from regis-

* I communicated by telephone on May 10, 1974 with Nicholas Papajohn, a member of the staff of the Securities Division of the American Stock Exchange, to find out whether a record date had been fixed for the annual meeting of shareholders of NJB (which was subsequently held on June 13, 1974). Mr. Papajohn informed me that no information whatever concerning the calling of a meeting or the fixing of a record date therefor had yet been communicated by NJB to the American Stock Exchange. In light of the fact that NJB's listing agreement with that Exchange requires that the Exchange be given ten days' written notice in advance of the fixing of a record date, and in light of the further fact that NJB actually fixed May 10, 1974 as the record date for a meeting to be held on June 13, 1974, the failure to give such notice in respect of the record date of such meeting suggests a deliberate effort on the part of management of NJB to keep its shareholders, including D-Z, in the dark and lull D-Z into a false sense of security concerning the time which might be available to it to mount a proxy contest.

tration under the Investment Company Act is a matter of no concern to NJB. The memorandum of law submitted on behalf of plaintiff herein discusses the well settled proposition that the Investment Company Act of 1940 ("1940 Act") was enacted for the protection of public investors whose funds were managed by investment companies, and that the issuers of shares owned by investment companies have no legitimate interest whatever in enforcing the provisions of that Act. The management of NJB obviously is not concerned with protecting the shareholders and noteholders of D-Z (indeed, the reverse is true, for NJB's management is seeking relief against the stockholders and noteholders of D-Z as additional defendants to its counterclaims). It seems strange indeed that NJB management seeks on the one hand to champion the rights of D-Z's shareholders and noteholders, none of whom have either requested or desire such assistance and, on the other, to sue the very beneficiaries they profess to represent. Further, the applicability of the provisions of the 1940 Act to the plaintiff is not called for by any Item contained in Schedule 13D, nor by Section 13(d) of the 1934 Act nor by Regulation 13D.

16. Plaintiff's Schedule 13D by no means misrepresents its intentions with regard to NJB. D-Z's intention to obtain control of NJB is explicitly stated, although the existence of specific, carefully worked out plans to that end is found far more in the imagination of defendants' counsel than is the case in reality. As is so often the case, plans and intentions must remain flexible in order to allow for future developments, take into con-

sideration hitherto unknown facts and meet changes in circumstances. Thus, for example, during late May and early June, prior to and at the time of D-Z's application for a preliminary injunction which sought a postponement of NJB's annual shareholders' meeting then scheduled for June 13, 1974, there appeared a reasonable likelihood that D-Z might succeed in its objective through the electoral process, and attention was directed toward a possible solicitation of proxies instead of toward further purchases of shares. When that no longer appeared feasible, D-Z's efforts were redirected toward the purchase of shares, but at no time has D-Z formulated a specific manner or fixed a specific course whereby it hoped to obtain control. I would consider it disingenuous and misleading to permit D-Z to state that it has done so, and for that reason the more general, but more accurate and truthful, broad statements were made.

17. The entire role of CF in plaintiff's activities is described in full in its letter agreement annexed as an exhibit to D-Z's Schedule 13D. There is no dispute that advice was given and services were rendered by CF, prior to the organization of D-Z, to Security Management Co., Inc., but information as to those services is not called for by Schedule 13D, by Section 13(d) of the 1934 Act nor by Regulation 13D. It is a matter wholly apart from anything D-Z has done or may do, and, in my opinion, does not require disclosure by D-Z in its Schedule 13D. Kantor's carrying on at pages 14-15 of his Supplemental Affidavit concerning D-Z's

failure to disclose its "arrangement" with CF to pay to CF a 5-4-3-2-1 finders fee for financing which CF may assist in arranging is still another puff of smoke behind which there is no substance. As is known to every attorney in the City of New York who has ever had dealings with investment bankers, there is not an investment banking firm which does not expect to receive a fee if it finds financing for a client. If CF had assisted in arranging satisfactory financing of, say, \$2,000,000 (which it did not), it would have expected to receive a fee of \$90,000 under a 5-4-3-2-1 arrangement. So would any other investment banker which was able to arrange such financing for D-Z. Accordingly, exactly what is Mr. Kantor complaining about? Can he really be serious in urging that a Schedule 13D requires disclosure of an "arrangement" to pay a standard finders' fee in connection with future financing? Would not such a disclosure carry with it an implication that such financing was in fact available? Finally, D-Z not only never signed any agreement with CF regarding such arrangement, but under no circumstances would the obligation to CF arise unless and until the financing actually took place.

18. With reference to the allegations of paragraph 24 of Mr. Kantor's affidavit, regarding the purpose of D-Z's stock acquisition, I respectfully refer to the matter set forth above as well as to the Schedule 13D itself. Regarding Mr. Kantor's complaint in subparagraph (d) of paragraph 24, that plaintiff "must be intending to merge" with NJB since it "has no assets"

except the NJB shares and cannot repay its notes unless it acquires control of the assets of NJB", I must repeat the fact that neither Schedule 13D, Section 13(d) of the 1934 Act nor Regulation 13D requires, in a mere informational filing (as opposed to a filing made in connection with a tender offer), any discussion of how borrowed money is to be repaid. Had the SEC wished Item 3 to be enlarged to require such disclosure, it doubtless would have done so. Moreover, Kantor's speculations to the contrary notwithstanding, the accompanying Davis affidavit attests to the fact that plaintiff did not, and still does not, have any firm plans to merge with NJB.

19. Kantor's Supplemental Affidavit has added nothing to defendants' trumped-up case. The fact -- never disputed -- that plaintiff is negotiating (thus far without success) to raise additional moneys in order to acquire more shares of NJB is certainly not required to be disclosed in a Schedule 13D. Indeed, it is just that sort of disclosure -- of nothing more than speculative hopes -- which can mislead investors. How the failure to disclose the mere fact that plaintiff is seeking funds can give rise to a false Schedule 13D -- particularly one filed in a non-tender offer situation, simply eludes me. At such time as plaintiff has obtained binding commitments for, or entered into definitive agreements for funds "to be used" in making purchases of NJB shares, plaintiff will appropriately amend its Schedule 13D setting forth a description of "the Transaction and the names of the parties thereto".

20. Plaintiff has duly and timely filed all amendments to its Schedule 13D which were required to be filed. Regulation 13d-2 calls for the prompt filing of an amendment after "any material change occurs". In preparing D-Z's Schedule 13D Amendments I considered an increase in plaintiff's holdings of NJB shares by 2% of the total outstanding to be "a material change" and have filed amendments accordingly. Amendment No. 3 covers a significantly larger number of shares only because of the substantial purchases made on July 1 and July 2. Plaintiff's filing of Amendment No. 5, two days after Amendment No. 4 reflects its continued diligence to file promptly after a material event occurred. In the case of Amendment No. 5, the filing was made to reflect an advance by Bruce R. Davis to plaintiff of \$75,000; in the case of Amendment No. 6 it was to reflect an additional note purchaser.

Kantor's complaints about Amendment No. 4 are equally groundless. The bank loan to which he makes reference was simply the substitution of one margin lender (Columbia Savings) for another margin lender (CF) as to shares of NJB already purchased by plaintiff.

C. Defendants Have Withheld A Material Fact From This Court.

21. Such limited activities as may have been engaged in by CF's personnel involving the use of the NJB shareholders list during three days in June are more fully dealt with in the

accompanying Davis Affidavit and plaintiff's Memorandum of Law. The Court should, however, take into account that as soon as my firm learned of such activities we advised that they cease, and they did. This all took place prior to the time these defendants even appeared in this action.

22. I also wish to call the attention of the Court to one aspect of the issues involving these activities because I believe it sheds significant light on the defendants' own disregard for candor and full disclosure in their conduct of this lawsuit. I refer specifically to the Maki affidavit, and to Mr. Kantor's disingenuous reference to its contents in his Supplemental Affidavit of August 2, 1974, as "independent evidence"* (§35). Nowhere in defendants' papers is Maki in any manner identified; presumably, the plaintiff and the Court are expected to assume that he is merely a shareholder of NJB who (fortuitously, one is to suppose) was in communication with defendants' counsel and agreed to furnish them with an affidavit for their use in these proceedings.

23. However, Maki is far from being merely a shareholder of NJB. As set forth in NJB's Proxy Statement dated May 20, 1974, the Advisor to NJB is a joint venture between wholly

* Any reference to the hearsay assertions contained in the July 19, 1974 affidavit of Herbert M. Wachtell - defendants' counsel -- as further "independent evidence" is similarly disingenuous. On July 19, Wachtell sought to justify his resort to hearsay allegations by explaining (§1): "Due to the press of time necessitated by the present motion, we have been unable to obtain Mr. Wilberg's affidavit. Mr. White is presently in Canada and is thus unable to submit his own affidavit." It is now nearly 30 days since Wachtell filed his affidavit, and still no competent evidence has been presented to support his hearsay charges.

owned subsidiaries of Greater Jersey Bancorp and Prime Motor Inns, Inc. New Jersey Bank, N.A. is referred to in the Proxy Statement as a subsidiary of Greater Jersey Bancorp. What, one may ask, has all this to do with Maki? The answer, revealed at page 628B of III Martindale-Hubbell's Law Directory [1974], a copy of which is annexed hereto as Exhibit A, is that Maki -- Allan A. Maki -- is not merely an independent shareholder who has come forward to give disinterested testimony, but rather, he is a lawyer who acts as general counsel for New Jersey Bank, N.A. It is fair to assume, by reason of the Martindale listing, that the relationship between Maki and New Jersey Bank, N.A., is of no small importance to Maki, and it is also fair to assume that the moving defendants knew of this relationship. Indeed, they must know of it since defendants Holloway, Brick and Brassler are the three highest officers of New Jersey Bank and surely are aware of the identity of their own general counsel. I submit that their willful non-disclosure of this fact and their reliance upon Maki's affidavit as "independent evidence" is a far more serious nondisclosure of material information than is anything with which plaintiff has been charged.

CONCLUSION

24. Defendants' 60 pages of affidavits and 115 page brief is a pastiche of inaccuracies, distortions, and half truths. They have accepted no restraints in their irresponsible

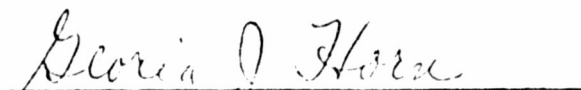
Affidavit of Joseph B. Russell

and desperate attack, in the hope that some shred of evidence may have been adduced or some argument may have been advanced which will permit them to enlist the aid of this Court to ward off their deepest fear -- that plaintiff which is far and away the largest shareholder of NJB will achieve its stated objective, control of NJB.

WHEREFORE, your deponent respectfully submits that defendants' motion should, in all respects, be denied.


Joseph B. Russell

Sworn to before me this
15th day of August, 1974


Notary Public

GLORIA J. HORN
Notary Public, State of New York
No. 24423
Columbia County
Commission Expires March 30, 1975

**EXHIBIT A--PAGE 628B OF MARTINDALE-HUBBELL'S
LAW DIRECTORY [1974] ANNEXED TO
AFFIDAVIT OF JOSEPH B. RUSSELL**

628B

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MEMBERS OF FIRM

Benedict Krieger, born Passaic, New Jersey, 1904; admitted to bar, 1925, New Jersey. Legal education, Fordham University (LL.B., cum laude, 1924). Member: Passaic City Board of Education, 1944-1950; Passaic City Redevelopment Agency, 1950-1956. President: Jewish Community Council of Passaic, 1945-1949; Trustee, Beth Israel Hospital of Passaic, 1967—. Member: Passaic County, New Jersey State and American Bar Associations.

Herbert C. Klein, born Newark, New Jersey, June 24, 1930; admitted to bar, 1953, District of Columbia; 1956, New Jersey. Preparatory education, Rutgers University (B.A., 1950); legal education, Harvard University (J.D., 1953) and New York University (LL.M., 1953). Council, Passaic County Park Commission, 1962-1963. President, Family Mental Health Service of Clifton, 1964-1966. Member, State Legislature (Assistant Democratic Whip), 1972—. Member: Essex County and Passaic County Bar Associations.

Arnold G. Shurkin, born Paterson, New Jersey, October 25, 1938; admitted to bar, 1964, New Jersey. Preparatory education, University of Pennsylvania (B.S., 1959); legal education, Rutgers University (LL.B., 1963). Member: Passaic County Bar Association.

William J. Pollinger, born Passaic, New Jersey, December 14, 1944; admitted to bar, 1969, New Jersey. Preparatory education, Rutgers University (A.B., 1966); legal education, Washington College of Law (J.D., 1969). Fraternity: Phi Delta Phi. Member, Equity Lodge, 257, F.&A.M., 1971—. Member: Passaic County Bar Association.

Lary I. Zucker, born New York, N. Y., August 23, 1947; admitted to bar, 1972, New Jersey. Preparatory education, University of Akron (B.A., 1969); legal education, University of Akron (J.D., 1972). Member: American Bar Association.

REPRESENTATIVE CLIENTS: Orland Savings & Loan Assn.; First Real Estate Investment Trust of New Jersey; Glen View Development Co.; Greater New York Insurance Group; Medicor Insurance Group; Chemical Corporation of America; Motor Club of America Insurance Co.; Security Insurance Group; Executive Insurance Co.

REFERENCES: Bank of Passaic & Clifton; New Jersey Bank & Trust Co.

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Allan A. Maki, born 1922; admitted to bar, 1948, New Jersey. Preparatory education, Muhlenberg College (A.B., 1944); legal education, Columbia University Law School (J.D., 1947). Member: Passaic County, New Jersey State and American Bar Associations.

Harold M. Krulowitz, born Passaic, New Jersey, October 15, 1904; admitted to bar, 1931, New Jersey. Legal education, Rutgers University (LL.B., 1929). Member: Passaic County Bar Association.

GENERAL COUNSEL FOR: New Jersey Bank, N.A.; Fairfield National Bank, Fairfield, N. J.; Bobbick Nurseries, Inc.; Latham Co.; New Jersey Mortgage and Title Co.; Fumwoods, Inc.; Howe Richardson Scale Co.; LHC Corp.; Elkon National, Inc.; Neo Gravure Printing Co.

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Adrian D. Sullivan (1894-1933).

Arthur J. Sullivan (1916-1959).

Arthur J. Sullivan, Jr., born Passaic, New Jersey,

November 1, 1924; admitted to bar, 1951, New Jersey. Preparatory education, Princeton University (B.A., 1946); legal education, Yale University (LL.B., 1950). Fraternity: Phi Delta Phi.

AFFIDAVIT OF WILLIAM P. MILLER IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D-Z INVESTMENT COMPANY,

Plaintiff,

-against-

ROBERT E. HOLLOWAY, MELVIN S. TAUB,
MAURICE J. BRICK, PETER E. SIMON,
NORMAN BRASSLER, CHARLES GILLER,
HERBERT E. HARPER, DR. GORDON MCKINLEY,
JAMES R. MOSELEY, III, JACK G. TAYLOR,
DALIAS S. TOWNSEND, JR. and NJB PRIME
INVESTORS,

Defendants,

-and-

SECURITY MANAGEMENT CO., INC., CANTOR,
FITZGERALD & CO., INC., BRUCE R. DAVIS,
JEROME ZIMMERMAN, RALPH M. BECKER, SAUL
BECKER, BERNARD KROLL, MAX SOPHIER,
HAROLD LEVOW, HAROLD B. LEVIN, HARVEY
JACOBSON, SEYMOUR WEINBERG and RONALD
D. FEINMAN,

Additional Defendants
to Counterclaims.

74 Civ. 2379
(I.B.W.)

AFFIDAVIT OF
WILLIAM P. MILLER
IN OPPOSITION TO
INDIVIDUAL DEFEN-
DANTS' MOTION FOR
A PRELIMINARY
INJUNCTION

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

WILLIAM P. MILLER, being duly sworn, deposes and says:

1. I am a Senior Vice President of Cantor, Fitzgerald &

Co., Inc. ("CF") and respectfully submit this affidavit in order to

ONLY COPY AVAILABLE

advise the Court of the circumstances surrounding the purchases of shares of NJB Prime Investors ("NJB") which were made by my firm on behalf of our client, D-Z Investment Company ("D-Z"). I am a registered principal with the National Association of Securities Dealers, Inc. I am also a member of the Bar of the State of New York and a certified public accountant.

2. CF is registered as a broker-dealer with the Securities and Exchange Commission ("SEC") with offices in Beverly Hills, California and New York with over 200 employees. It is active in the so-called "third market". The term "third market" was coined by the SEC to describe the over-the-counter trading of listed securities, principally by institutions through broker-dealers. CF is, to the best of my information and belief, the leading third market block trading firm. The firm trades substantial blocks of stock in transactions for the major domestic financial institutions, including banks, insurance companies, mutual funds, pension funds, both private and public, as well as other broker-dealers. In volume, CF trades, on a monthly basis, approximately 7,000,000 shares having a monetary value of approximately \$200,000,000. On an annual basis, our dollar volume in third market trades well exceeds two billion dollars. The third market, according to the SEC "Institutional Investor Study", grew principally due to its ability to trade blocks of securities

at a better net price for its institutional clients. That is, third market firms are not compelled to charge fixed minimum commission rates and, therefore, can negotiate both their profit and the price at which a block is to be traded directly with their clients without the necessity of interposing the exchange mechanism, including the specialist, in such transactions.

3. All purchases of NJB shares for the account of D-Z were made under my supervision. These purchases consisted of 97,200 shares purchased in privately negotiated third market transactions and 68,800 shares purchased in open market transactions through the facilities of the American Stock Exchange. All purchases took place between April 19, 1974 and July 17, 1974.

4. The privately negotiated transactions in which D-Z acquired shares of NJB consisted of the following:

A. 60,000 shares were acquired on April 23, 1974 in the following manner. There is a volume known as "International Securities Locator" published by Scheinmann Ciaramella International, Ltd. This is a loose-leaf service which has a section which shows the institutional holders of securities listed on the New York and American Stock Exchanges and their holdings. It is updated on a periodic basis. In reviewing the November, 1973 supplement, I noted that REIT Income Fund held 60,000 shares of NJB

stock in its portfolio. The Institutional Department of CF, under my specific instructions, contacted this institution for the purpose of ascertaining whether it would be interested in selling its position. This is a normal procedure in procuring block trades in the third market, CF acting for a would-be buyer or seller of a block seeks out the other party to the transaction. In this instance, REIT Income Fund was willing to sell its position and the block was acquired on April 23, 1974 at a price of 6-1/8. On that date the last sale of NJB on the American Stock Exchange was 6-1/2. It should be noted that on that date 800 shares had been traded over the facilities of the American Stock Exchange, all at a price of 6-1/2. It is not unusual for large blocks such as this, which do not represent a controlling position, to trade at a slight discount compared to current sales on the Exchange facilities. However, it should also be noted that the seller received a net price arrived at by the process of normal negotiation which occurs in all block transactions.

B. 25,000 shares were acquired on successive trading days from another institutional seller, i.e., 15,000 shares on May 24, 1974 and 10,000 shares on May 28, 1974. (The intervening days resulted from the three-day Memorial Day weekend.) These shares were obtained as a result of a review of the NJB shareholders list. In reviewing the list, it was noted that 12,110 shares were

Affidavit of William P. Miller

listed in the name of Comtru & Co. and that 41,219 shares were listed in the name of Tranco & Co. These two names are street nominee names for Traders National Bank of Kansas City, Missouri, an institution with which my firm has had prior block trading transactions. Accordingly, I caused that institution to be called to ascertain whether they would be interested in disposing of their block of NJB. The trader for the Bank indicated that he was interested in disposing of some, but not all, of his position and, accordingly, the 25,000 shares were purchased, all at a price of 5-3/8 per share. It should be noted again that this sale was made at a negotiated price which was a fraction below the last sale on the American Stock Exchange.

C. 5,000 shares were acquired on June 14, 1974 from First National Bank of Montgomery, Alabama. Mr. William Schwartz, of my firm, has given testimony in his deposition concerning the circumstances surrounding that sale which, again, was a usual third market transaction effected with an institution which is accustomed to buying and selling securities in this manner. This sale too was at a negotiated price.

D. 7,200 shares were acquired on July 3, 1974, as follows. Late in the afternoon of July 2, 1974, CF's Trading Department in Beverly Hills, California, received a telephone call from the brokerage firm of C. L. McKinney of Los Angeles, Calif-

ornia. They indicated to our trader that they had heard of our interest in acquiring shares of NJB and asked if we had any interest in making a bid to them for the 7,200 shares which they had. The trader in California telephoned me to ascertain whether we had interest in acquiring that many shares and what would be our best price. After consulting with Mr. Bruce Davis, President of D-Z, I instructed our trader to make a bid at a fraction below the last sale on the American Stock Exchange. This was done on July 3, 1974, and the sale was made at a price of 5-11/16.

5. The foregoing is the sum and substance of the privately negotiated transactions which resulted in the acquisition of 97,200 shares of NJB stock for the account of D-Z. It will be noted that each of the four transactions was with an institution or broker-dealer familiar with, and, indeed, an active participant in, third market transactions. None of the sellers was pressured into making the trade, nor are these trades anything other than normal, usual transactions in the ordinary course of business. Each of the trades was made at a price a fraction below the last sale as reflected on the American Stock Exchange. In addition, the sellers of the securities received the net proceeds of the sale remitted directly to them without the deduction of the usual commission

6. D-Z also acquired 68,800 shares over the facilities of the American Stock Exchange during the period between April 19, 1974 and July 17, 1974. Set forth below is a tabulation of the respective weekly volume in shares of NJB, the weekly high and low, and the weekly volume of D-Z's purchases. I have prepared this tabulation for the thirty-week period commencing with the week ending January 4, 1974 and terminating with the week ending July 26, 1974. This Court will note that D-Z's purchases had absolutely no impact on the market price for shares of NJB. (The Court should note that the abnormally high price of 8-5/8 during the week ending May 24, 1974 reflects the fact that a dividend of \$1.55 per share was announced during that week. The same week, the stock went "ex dividend", which resulted in its drop in price.)

Affidavit of William P. Miller

<u>Week Ending</u> <u>(1974)</u>	<u>Total</u> <u>Volume</u>	<u>Purchases</u> <u>of D-Z</u>	<u>High</u>	<u>Low</u>
January 4	14,900		11-1/8	10-3/8
January 11	14,500		11-7/8	9-3/8
January 18	25,500		9-6/8	7-4/8
January 25	18,600		7-6/8	6-1/8
February 1	18,900		7-2/8	6-3/8
February 8	21,600		6-6/8	5-7/8
February 15	16,400		8-3/8	6-7/8
February 22	3,700		8-3/8	7-5/8
March 1	5,200		7-7/8	7-3/8
March 8	106,000		7-6/8	6
March 15	18,900		7-2/8	6-5/8
March 22	6,200		7	6-3/8
March 29	22,600		6-6/8	6
April 5	26,600		6-3/8	5-4/8
April 12	30,500		5-4/8	4-4/8
April 19	15,300	1,000	6-3/8	5-2/8
April 26	16,600	10,000	6-5/8	6-2/8
May 3	6,500	200	6-5/8	6-1/8
May 10	9,400	4,100	6-7/8	6-3/8
May 17	10,700	3,200	7	6-2/8
May 24	48,100	4,200	8-5/8	5-5/8
May 31	3,700		5-6/8	5-3/8
June 7	4,700	1,000	5-4/8	5-1/8
June 14	9,200	1,900	6-2/8	5-4/8
June 21	11,600	6,100	6-2/8	5-7/8
June 28	13,100	11,700	6	5-5/8
July 5	27,100	17,900	6	5-4/8
July 12	2,900	1,100	5-4/8	4-6/8
July 19	12,600	6,400	5-6/8	5
July 26	4,700		5-5/8	5-1/8

7. I further advise this Court that D-Z's buying activity

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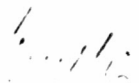
Affidavit of William P. Miller

was done in such manner as to have the least impact on the market price for shares of NJB, and as seen from the tabulation above, such was the case. Since CF is not a member firm of the American Stock Exchange, it places orders for purchases thereon through member firms. In connection with purchases of NJB shares for the account of D-Z, orders were placed only through Merkin & Co.; Drexel, Burnham & Co., Inc.; Schweickart & Co.; and Ladenberg, Thalmann & Co. Of the 68,800 shares which were acquired through the facilities of the American Stock Exchange, 30,500 shares were purchased through Ladenberg, Thalmann; 5,200 shares were purchased through Drexel, Burnham; 2,000 shares were purchased through Schweickart; and 31,100 shares were purchased through Merkin & Co. (CF's own member broker for Exchange transactions). At no time was an order placed with any of the aforesaid brokerage firms to purchase shares at a price greater than the last sale price and, further, at no time was any order placed to purchase a quantity greater than 2,000 shares and, usually the order was to purchase 1,000 shares.

8. All shares of NJB which were acquired for the account of D-Z were purchased either after I had made prior consultation with Mr. Bruce Davis, President of D-Z, or pursuant to my general instructions from him, which were to purchase no more than 4,000


Affidavit of William P. Miller

shares in any one day and not to place any purchase orders at a price higher than the last sales price. Any notion that D-Z had placed an order to buy every available share is simply false. Indeed, the chart set forth above demonstrates beyond peradventure that such was not the case. D-Z's purchases were kept at modest levels in order not to have an impact upon the market price for shares of NJB.



William P. Miller

Sworn to before me this 15th
day of August, 1974.


Elaine Meyer
Notary Public
Qualified in New Jersey

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OPINION AND ORDER OF WYATT, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

D-2 INVESTMENT COMPANY,

Plaintiff,

-against-

74 Civ. 2370

ROBERT E. HOLLOWAY, MELVIN S. TAUB,
MAURICE J. BRICK, PETER E. SIMON,
NORMAN BRASSLER, CHARLES GILLER,
HERBERT E. HARPER, DR. GORDON MCKINLEY,
JAMES R. MOSLEY, III, JACK G. TAYLOR,
GALLAS S. TOWNSEND, JR. and NJB PRIME
INVESTORS,

Defendants.

-and-

SECURITY MANAGEMENT CO., INC., CANTOR,
FITZGERALD & CO., INC., BRUCE R. DAVIS,
JEROME ZIMMERMAN, RALPH H. BECKER, SAUL
BECKER, BERNARD KROLL, MAX SOPHIER,
HAROLD LEVOW, HAROLD B. LEVIN, HARVEY
JACOBSON, SEYMOUR WEINBERG and RONALD
D. FEINMAN,

Additional Defendants
to Counterclaims

- - - - - x

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Opinion and Order of Wyatt, J.

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Of Counsel

WYATT, District Judge,

This is a motion by the individual defendants for a preliminary injunction restraining plaintiff and its affiliates etc. from

(1) purchasing, offering to purchase, ordering or otherwise arranging to purchase shares of beneficial interest in RJB Prime Investors, Inc.;

(2) soliciting, inviting, requesting or otherwise attempting to procure proxies, authorizations or consents to the call of a special shareholders' meeting of RJB Prime Investors, Inc. and

(3) voting or otherwise exercising any rights incident to the ownership or control of any shares of RJB Prime Investors, Inc. owned or controlled by them.

Fed. R. Civ. P. 65 The motion was heard on August 16. " Affidavits were submitted by both sides and it was stated for both sides that no testimony was desired to be taken by the Court.

The background history begins with the desire of Bruce R. Davis of Atlanta to find a business entity with which could be merged Security Management Co., Inc. (Security), a Georgia corporation in which Davis was the chief figure.

Davis sought and obtained the help of Cantor, Fitzgerald & Co., Inc. (Cantor), the state of incorporation of which does not appear, a broker and dealer in securities with offices in New York City and Beverly Hills, California.

Davis and Cantor eventually selected NJB Prime Investors (NJB) as the entity whose control Davis should obtain. NJB is a Massachusetts business trust which has about 1,280,450 shares outstanding, listed on the American Stock Exchange and registered for such exchange under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781; the 1934 Act). NJB, whose principal office is apparently in Clifton, New Jersey, is also a real estate investment trust under the Internal Revenue Code (26 U.S.C. § 357).

Jerome Zimmerman, also of Atlanta, joined Davis in his endeavor.

Davis first tried to secure the consent of NJB management to his taking control but, doubtless motivated by a desire to retain its loaves and fishes, management declined.

D-2 Investment Company (D2) was then incorporated in Delaware on April 23, 1974. Beginning April 17, shares of NJB were bought for D2 and D2 purchases continued after its

Opinion and Order of Wyatt, J.

incorporation. The principal office of DZ seems to be in Atlanta: its shares are owned by Security and by Zimmerman.

On April 23, DZ was the owner of 65,600 NJB shares, or more than 5% of such shares. DZ was thus required under the 1934 Act to file a statement (called Schedule 13D) with the SEC (15 U.S.C. § 78n(d)).

DZ filed a Schedule 13D dated April 26 (said to have been filed May 3) and amendments thereto, numbered and dated as follows

No. 1	May 21
No. 2	June 3
No. 3	July 8 (said to have been filed July 9)

By July 3, DZ had purchased 158,500 shares of NJB.

The annual meeting of NJB was to be held on June 13 and its management had sent out on May 20 materials soliciting proxies.

On June 3, DZ commenced this action, which was assigned to me. The individual defendants are the trustees of NJB and is NJB/itself a defendant. The principal object of the action, and so far as appears, the only object of the action, was to secure an injunction against the use by defendants of proxies obtained by them and to secure a postponement of the June 13 annual meeting. The complaint alleged that the proxy solicitation material of defendants violated Section 14(a) of the 1934 Act (15 U.S.C. § 78n(a)).

Opinion and Order of Wyatt, J.

On June 3, DZ moved for a preliminary injunction, which motion was heard by Judge Cannella (as the emergency judge) and denied by order with opinion filed June 11. Apparently an expedited appeal was denied by the Court of Appeals on June 12.

The June 13 meeting of MJB was held and the management trustees were reelected.

On June 25, MJB filed its answer with counterclaims and on July 18 the individual defendants filed their joint answer with counterclaims.

Since the present motion is by the trustees and is based on their counterclaims, these last should be noted. There are six counterclaims. These are asserted not only against DZ but against additional defendants, presumably named under Fed. R. Civ. P. 13(h). The additional defendants to the six counterclaims are Security, Cantor, Davis, and Silverman (these have already been described) together with two other officers and directors of DZ and Security and six Atlanta residents who purchased notes issued by DZ.

The first counterclaim asserts that DZ has solicited proxies in respect of MJB shares in violation of Section 14(a) of the 1934 Act, Regulation 14a of the SEC, and Rules of the SEC thereunder - specifically, that DZ did not file Schedule 14B (see Rule 14a-11(c)), that the persons solicited were not given a written proxy statement with information specified in Schedule 14C (see Rule 14a-3(a)), and that DZ used false and

Opinion and Order of Wyatt, J.

misleading statements (see Rule 14a-9).

The second counterclaim asserts primarily a violation by Cantor of the margin requirements of Section 7 of the 1934 Act (15 U.S.C. § 78g) and of Regulation T of the Federal Reserve Board thereunder. It is also asserted that the controlling persons of DZ and the note purchasers from DZ violated Regulations G and X of the Board. There are references in paragraph 48 to "underscored extension of credit"; it is assumed that "undersecured" was intended.

The third counterclaim is based on two accusations: (a) that DZ is an investment company, is required to register as such under the Investment Company Act of 1940 (15 U.S.C. § 80a-1 and following; the 1940 Act), and has not done so; and (b) that DZ was required to register its 6½ notes under the Securities Act of 1933 (15 U.S.C. § 77a and following; the 1933 Act) and has not done so. There is a reference to a claimed "false and misleading" aspect of the Schedule 13D filed by DZ but since this overlaps the sixth counterclaim, it may be disregarded in considering the third counterclaim.

The fourth counterclaim asserts that DZ and the additional defendants are a "syndicate or group" and as such are required by Section 13(d) of the 1934 Act (15 U.S.C. § 78n(d)) to file a Schedule 13D but have not done so.

The fifth counterclaim asserts that the purchases by DZ of the shares of DDB amounted to a "tender offer" under Section 14(c) and (e) of the 1934 Act (15 U.S.C. § 78n(d)).

Opinion and Order of Wyatt, J.

that a statement was required to be filed by DZ under such section and under Rule 14d-1 of the SEC, and that DZ did not file such a statement.

The sixth counterclaim asserts that the Schedule 13D and its amendments filed by DZ were false and misleading in violation of Sections 13(d) and 14(e) of the 1934 Act (15 U.S.C. § 78n(d) and e, 78n(d) and (e)). There is also a charge that DZ failed promptly to file amendments to Schedule 13D showing its large scale purchases of 888 shares in the period June 3 - July 9, 1974. This last raises the question as to what promptly means in Rule 13d-2 of the SEC. The word is not used in the statute (15 U.S.C. § 78n(d)(2)). It appears without dispute that the purchases through April 23 were reported within 10 days; that subsequent purchases through May 16 were reported on May 21; that subsequent purchases through May 28 were reported on June 3; and that subsequent purchases through July 3 were reported on July 9. By any standard these amendments were filed promptly and this particular point attempted to be made in the sixth counterclaim is so piddling that it must be disregarded.

The present motion for a preliminary injunction appears to be based on the six counterclaims except that the fourth counterclaim is not urged and for present purposes may be put to one side. In my judgment, it is without merit in any event.

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It seems clear that there is a struggle here between two groups over the control of NJB and that each group has attempted to use this Court to further its objective. DZ moved to restrain management and Judge Cannella (wisely, in my view) denied the motion. Now management moves to restrain DZ; it seems clear that this motion should also be denied. Management is simply trying to protect its entrenched position and, while its attackers must obey the securities laws, enforcement of those laws is, with rare exceptions, best left to the SEC or to the stockholders of NJB. See *General Time Corp. v. Am. Investors Fund, Inc.*, 263 F.Supp. 400, at 403 (S.D.N.Y. 1966) (Bryan, J.), affirmed (but for reasons not here relevant), 403 F.2d 150 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969).

2.

The second counterclaim may be disregarded. After careful study, I conclude that no showing has been made of any violation of the margin requirements. This need not be discussed, however, because even if there were such violations, they caused no damage to movants and in any event they have no standing to complain. *Weisel v. North Jersey Trust Co.*, 218 F.Supp. 274, 277 (S.D.N.Y. 1963); *Nachman Corp. v. Halfred, Inc.*, 608 Fed. Sec. L. Rep. 95, 589, at 95, 594 (S.D. Ill. 1973).

3.

The third counterclaim may be disregarded. After careful study, I conclude that no showing has been made of any

Opinion and Order of Wyatt, J.

violation of the 1940 Act or of the 1933 Act. This need not be discussed, however, because even if there were such violations, they caused no damage to movants and in any event they have no standing to complain. SEC v. General Time Corp., 407 F.2d 65, 71 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969); Greater Iowa Corp. v. McLendon, 379 F.2d 763 (8th Cir. 1967); General Time Corp. v. Am. Investors Fund, Inc., above, at 401; Rachman Corp. v. Halfred, Inc., above, at 95, 995.

4.

This leaves for consideration the first, fifth, and sixth counterclaims. It may be well to consider the fifth counterclaim at this point.

The fifth counterclaim is based on alleged violations by D2 of the Williams Act (82 Stat. 454) (1968), specifically Sections 14(d) and (e) added to the 1934 Act (15 U.S.C. § 78n(d) and (e)) by the Williams Act.

The theory of movants is that the purchases by D2 amount to a tender offer under the Williams Act and that the statements required by Rule 14d-1 and Rule 14d-4 have not been filed by D2.

The target corporation has standing to complain of violations of Sections 14(d) and (e) of the 1934 Act. Electronic Specialty Co. v. International Controls Corp., 400 F.2d 937, 944 46 (2d Cir. 1969). If so, it is assumed that directors or trustees of the target corporation also have standing.

Has D2 made a tender offer?

Opinion and Order of Wyatt, J.

It appears without dispute that between April 19 and July 17 DZ through Cantor bought 166,000 NJB shares, of which 68,800 shares were bought on the Exchange in open market transactions and 97,200 shares were bought in four privately negotiated transactions with four separate financial institutions, each highly sophisticated.

The activities of DZ certainly do not constitute a conventional tender offer and have nothing characteristic of such an offer.

There is no authority in this Circuit for extending tender offer beyond its normal meaning.

Movants argue that there should be an extension. It seems clear, however, that open market purchases cannot be a tender offer. There is also authority for this. Judge Duffy, whose extensive SEC experience adds weight to his views in this field, so held in G & W Indus., Inc. v. Great A & P. Tea Co., Inc., 356 F.Supp. 1066, 1073-74 (S.D.N.Y. 1973), affirmed (but not mentioning this point) 476 F.2d 687 (2d Cir. 1973). Such seems also to have been held in Water & Wall Associates, Inc. v. Am. Consumer Industries, Inc., 1973 OCA Fed. Sec. L.Rep. at p. 93,750 (D.C.J. 1973). In Nachman, above, Judge McLaren stated flatly (at p.95,592). "The market transactions . . . on behalf of Halfred do not constitute a tender offer . . . And Judge Marshall in the Northern District of Illinois last month found that certain conduct was a tender offer to the extent that it engages in anything other than open market purchases". Loewe

Opinion and Order of Wyatt, J.

Corp. v. Accident & Casualty Insurance Co., ___ F.Supp. ___
(74 C 1396; July 11, 1974)

The open market purchases of DZ must be disregarded.

Movants argue, as to the four purchases off the market, in substance that a tender offer should include any offer to purchase securities likely to pressure shareholders into making uninformed, ill-considered decisions to sell.

Note: The Developing Meaning of Tender Offer etc., 86 Harv.L. Rev. 1250, 1281 (1973) This seems to me much too broad but, using it as a test, the private transactions of DZ would not be a tender offer. The Schwartz telephone calls to sophisticated persons (movants' memo, p.76), some two dozen, in all, and the four actual purchases from financial institutions do not meet the test.

The activity of DZ does not seem to me to amount to a tender offer.

5.

We may now turn to the first counterclaim which in essence avers that DZ has solicited proxies in violation of Section 14(a) of the 1934 Act and Rules of the SEC thereunder.

The claim of proxy solicitation is based on deposition testimony of Schwartz, an officer of Cantor, and to a lesser extent on deposition testimony of Miller, another officer of Cantor. It is argued (Memo for movants, pp. 52-54) that on June 17 and 18 Schwartz solicited proxies from 13 shareholders of ABC, or from more than the ten permitted by SEC rules (see Rule 14a 2).

Opinion and Order of Wyatt, J.

I have read all of the deposition of Schwartz (and also of Miller) including, of course, the pages cited by movants on this point (Kantor supplemental affidavit, paras 34-37). There is no proof in this testimony that Schwartz made any solicitation of any proxy, nor that he received or accepted any proxy from any MJB stockholder. The most that can be said is that between June 13 and 18 he telephoned several MJB stockholders to try to buy their shares, that in some of these calls he asked their attitude toward management, and that in some calls he may have referred to a possible special meeting if 20% of the stockholders desired it (for example, SM 35, 73, 75, 80, 83, 96, 97, 98, 170).

The first counterclaim is without any support in fact.

6.

The sixth counterclaim remains for consideration. This avers that the Schedule 13D and amendments filed by D2 were "false and misleading" in violation of the 1934 Act.

The basic argument for movants on this point depends entirely on their other argument, already noted, that D2 had made a "tender offer".

Counsel for D2 seem correct in pointing out that the Schedule 13D required of those (such as D2) not making a tender offer differs from the Schedule 13D required of those making a tender offer (such as Gulf & Western in the action already cited).

Opinion and Order of Wyatt, J.

Those making a tender offer must include in their Schedule 13D an Item 8 calling for the tender offer itself to be filed as an exhibit (see Section 14(d)(1) of the 1934 Act). Such tender offer must not be false or misleading (see Section 14(e) of the 1934 Act). If DZ were making a tender offer, then its Schedule 13D would be judged in the context of stockholders trying to decide whether to accept the tender offer or not.

DZ is not making a tender offer. Its Schedule 13D is required simply because it owns more than 5% of the HBB shares.

It is not shown that the Schedule 13D or any amendment is false or misleading.

7.

It follows from what has already been set forth that, while the arguments for movants have been thoroughly and ably presented, they still do not add up to a clear showing of probable success on the merits. There has also been no showing of any injury to movants. The worst that could happen to movants is that DZ might acquire enough shares to replace movants as trustees. But surely they have no vested interest in these places. If there be (and I think there are not) serious questions on the merits which amount to fair ground for litigation, then there is certainly no balance of hardships tipping decidedly toward movants. *Sonesta, etc. v. Wallington*, 495 F.2d 247, 250 (2d Cir. 1973)

The trustees, on this motion, denounce alleged violations of law by DZ in borrowing money and in buying HBB

Opinion and Order of Wyatt, J.

shares. It is worthy of note, however, that the lenders to DS are not complaining; indeed, a number of the principal lenders have been made defendants to the counterclaims. The sellers of DS shares are not complaining, neither those who sold on the open market of the American Stock Exchange nor the financial institutions - REIT Income Fund, Traders National Bank of Kansas City, First National Bank of Montgomery, the C. L. McKinney brokerage firm - which sold in four private transactions.

The foregoing contains the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

The motion is denied.

SO ORDERED.

Dated New York, New York
August 23, 1974

INTER B. WYATT
United States District Judge

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

D-Z INVESTMENT COMPANY, :

Plaintiff, :

-against- :

74 Civ. 2379
(I.B.W.)

ROBERT E. HOLLOWAY, MELVIN S. TAUB, :
MAURICE J. BRICK, PETER E. SIMON, :
NORMAN BRASSLER, CHARLES GILLER, :
HERBERT E. HARPER, DR. GORDON MCKINLEY, :
JAMES R. MOSELEY, III, JACK G. TAYLOR, :
DALLAS S. TOWNSEND, JR. and NJB PRIME :
INVESTORS, :

NOTICE OF APPEAL

Defendants, :

-and- :

SECURITY MANAGEMENT CO., INC. CANTOR, :
FITZGERALD & CO., INC., BRUCE R. DAVIS, :
JEROME ZIMMERMAN, RALPH M. BECKER, :
SAUL BECKER, BERNARD KROLL, MAX :
SOPHIER, HAROLD LEVOW, HAROLD B. :
LEVIN, HARVEY JACOBSON, SEYMOUR :
WEINBERG and RONALD D. FEINMAN, :

Additional Defendants :
to Counterclaims.

- - - - - x

PLEASE TAKE NOTICE that defendants Robert E. Holloway,
Melvin S. Taub, Maurice J. Brick, Peter E. Simon, Norman
Brassler, Charles Giller, Herbert E. Harper, Dr. Gordon McKinley,
James R. Mosely, III, Jack G. Taylor and Dallas S. Townsend,

Notice of Appeal

Jr. hereby appeal to the United States Court of Appeals for the Second Circuit from the order of this Court dated and filed August 23, 1974 which denied such defendants' motion for a preliminary injunction enjoining plaintiff, and those acting in concert with plaintiff, during the pendency of this action, from:

'1) purchasing, offering to purchase, ordering or otherwise arranging to purchase shares of beneficial interest in NJB Prime Investors;

(2) soliciting, inviting, requesting and otherwise attempting to procure proxies, authorizations or consents to the call of a special shareholders meeting of NJB Prime Investors; and

(3) voting or otherwise exercising any rights incident to the ownership or control of any shares of NJB Prime Investors owned or controlled by any of them.

Notice of Appeal

The above-described defendants appeal from each and every part of said order as well as from the whole thereof.

Dated: New York, New York
August 26, 1974

WACHTELL, LIPTON, ROSEN & KATZ

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EXCERPTS FROM DEPOSITION OF JEROME ZIMMERMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

D-2 INVESTMENT COMPANY,

Plaintiff,

vs.

ROBERT E. HOLLOWAY, MELVIN S. TAUB,
MAURICE J. BRICK, PETER E. SIMON, NORMAN
BRASSLER, CHARLES GILLER, HERBERT E. HARPER,
DR. GORDON MCKINLEY, JAMES R. MOSELEY, III,
JACK G. TAYLOR, DALLAS S. TOWNSEND, JR. and
NJB PRIME INVESTORS,

Defendants,

vs.

SECURITY MANAGEMENT CO., INC., CANTOR,
FITZGERALD & CO., INC., BRUCE R. DAVIS,
JEROME ZIMMERMAN, RALPH M. BECKER, SAUL
BECKER, BERNARD KROLL, MAL BOPHIER, HAROLD
LEVOW, HAROLD B. LEVIN, HARVEY JACOBSON,
and SEYMOUR WEINBERG,

74 Civ. 2379
(I.B.N.)

Additional Defendants to
Counterclaims

-----X

DEPOSITION of JEROME ZIMMERMAN, taken
pursuant to Notice, held at the offices of
Wachtell, Lipton, Rosen & Katz, Esqs.,
299 Park Avenue, New York, New York on the

BENJAMIN REPORTING SERVICE
5 Beekman Street
New York, New York 10036
374-1138

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15th day of July, 1974 at 10:00 a.m., before
Irwin H. Benjamin, a Notary Public of the
State of New York.

oOo

A P P E A R A N C E S :

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oOo

1
2 IT IS HEREBY STIPULATED AND AGREED by
3 and between the attorneys for the respective
4 parties hereto that filing, sealing and certifi-
5 cation be and the same are hereby waived.

6 IT IS FURTHER STIPULATED AND AGREED that
7 all objections, except as to the form of the
8 question, shall be reserved to the time of
9 the trial.

10 IT IS FURTHER STIPULATED AND AGREED that
11 the within examination may be subscribed and
12 sworn to before any Notary Public with the same
13 force and effect as though subscribed and sworn
14 to before this Court.
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Excerpts from Deposition of Jerome Zimmerman

4

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8
9 J E R O M E Z I M M E R M A N, having been first
10 duly sworn, was examined and testified as follows:

11 EXAMINATION BY MR. WACHTELL:

12 Q State your full name and present home
13 address, please.

14 A Jerome Zimmerman, 3144 Wood Valley Road, Northwest
Atlanta, Georgia 30327.

* * *

4 Q Mr. Zimmerman, are you familiar with the
5 plaintiff in this action, D-Z Investment Company?

6 A Yes.

7 Q Is D-Z a corporation?

8 A Yes.

9 Q Incorporated under the laws of what state?

10 A Delaware.

11 Q Where is the principal office of D-Z?

12 A Atlanta, Georgia.

13 Q What address?

14 A 420 14th Street.

* * *

22 Q Does D-Z have any other office?

A No, sir.

23 Q When was D-Z incorporated?

24 A April 1974.

25

* * *

15 Q Who caused D-Z to be formed, not the techni-
16 cal incorporator, who were the parties in interest as
17 you understand it, who determined to form D-Z, and
18 had it formed?

19 A Bruce Davis, and myself.

20 Q What was the purpose of the formation of
21 D-Z?

22 A To purchase stock in an REIT that would be a reward-
23 ing financial -- rewarding financially.

24 Q That is an adjective, is there a noun --

25 A Rewarding financially.

1 Zimmerman

21

2 Q You say in answer to my last question, Mr.
3 Zimmerman, that the purpose was to purchase stock in,
4 I think the word was REIT.

5 At the time of the actual formation of D-Z,
6 was there some particular REIT, one or more, the stock
7 of which was then intended to be purchased?

* * *

14 A At the time of the creation of D-Z, yes.

15 Q And would you identify the REIT or REITS
16 that were then the subject of the intent to purchase
stock?

* * *

23 * * *

A NJB Prime Investors.

* * *

24 * * *

Q Mr. Zimmerman, based on your knowledge or information, at the time of the formation of D-Z, was it intended that D-Z would purchase stock in any REIT other than NJB?

A I don't recall any.

Q To the best of your knowledge and recollection, at the time of the formation of D-Z, it was intended to purchase stock of NJB only, is that correct?

A Correct. Yes.

Q Was it intended to purchase stock or invest in any other business entity?

A No.

Q Now, when did you and Mr. Davis or you and Mr. Davis and perhaps anybody else, first have any discussion or communication with respect to any possible plan for purchasing stock of any REIT?

1
2 A Approximately December, January -- December 1973/74.

3 Q And what was the nature of that discussion,
4 or communication?

5 A At that time, there were a number of financial
6 institutions which would include REITS whose stock was
7 selling considerably below book value.

8 We considered it a possibility of a good business
9 investment to acquire stocks of more than one financial
10 institution, because of the relative value of buying
11 the stock at considerably less than book value.

12 Q Who first raised the subject, to the best
13 of your knowledge or information?

14 A I don't remember whether it was he or I.

15 Q Was it raised orally or in writing?

16 A Orally.

17 Q At a meeting or on the telephone?

18 A Personally.

19 Q Where?

20 A The first meeting I could not tell you.

21 Q Do you have any recollection?

22 A Not of the particular location of the first
23 meeting.

24 Q Who was present?

25 A Mr. Davis and myself.

1
2 Q Anybody else?

3 A No, sir.

4 Q And would you tell me to the best of your
5 recollection, what was said?

6 A Repetition of what I just told you, which is that
7 there would be a possibility of a profitable business
8 to purchase stock in a financial institution that the
9 stock was selling to the public at considerably less
10 than the book value of that institution.

11 Q Was there any mention at that first discus-
12 sion of any particular financial institution or in-
13 stitutions?

14 A The first discussion was --

15 MR. WILD: The answer is yes or no..

16 A Repeat the question.

17 (Record read.)

18 A Yes.

19 Q Identify them, please.

20 A Mr. Wachtell, I couldn't remember them. We
21 discussed many of them from public and published financial
22 statements that we had, and to remember any one of
23 them, I can't do it at this time.

24 Q Can you remember any of them?

25 A Hawthorne Financial Corporation.

1
2 Q Any others?

3 A I am not sure, but I think that NJB was mentioned.

4 Q Any others that you recall?

5 A Not by specific names.

6 Q You say or I think I understood you to say
7 that you discussed --

8 I think I understood you to say that you had
9 financial information present with respect to some
10 of these companies which you were discussing, is that
11 correct?

12 MR. WILD: I object to the form of the
13 question as repetitious. If you have a direct
14 question, I will permit him to answer.

15 Q Did you have financial information present
16 at the meeting with respect to any of the companies
17 that you were discussing?

18 A Yes.

19 Q Who brought the financial information to
20 the meeting?

21 A Mr. Davis.

22 Q And did you have financial information there
23 to the best of your recollection, with respect to NJB?

24 A I don't recall.

25 Q What was the nature of the financial -- when

Excerpts from Deposition of Jerome Zimmerman

1 Zimmerman 28

2 you say you don't recall, am I correct that you don't
3 recall one way or the other, you may have and you may
4 not have?

5 A That is correct.

6 Q What was the nature of the financial information
7 that was there? Was it --

8 A Published quarterly annual reports.

* * *

23 Q What was the outcome of that first meeting,
24 to your best recollection? Was anything decided?
25

30 * * *

1 Zimmerman 31

2 A No.

3 Q What happened next with respect to --

4 A There was an additional meeting.

5 Q And where was that?

6 A We went over additional --

7 Q I said where?

8 A I am sorry.

9 Mr. Davis' office.

10 Q When was that?

11 A Approximately one to four weeks later.

* * *

6 Q Who was present at the second meeting?

7 A Mr. Davis and Mr. Zimmerman.

8 Q That is yourself, is that correct?

9 A Correct.

10 Q Anybody else?

11 A No.

12 Q Would you tell me what was said at the
13 second meeting?

14 A Virtually the same conversation with a possibility
15 of narrowing down potential financial institutions.

16 Q Was NJB mentioned at that second meeting
17 as one such institution?

18 A Possibly.

19 Q To your best recollection?

20 A I have no positive recollection.

21 Q Were there any financial or other information
22 with respect to any of these targets, let me use the
23 word "targets." I think we can all understand what we
are talking about, at the second meeting?

19 Q Now, do you recall whether any information
20 regarding any potential target company was present at
21 your second meeting?

22 A There was information available, yes.

23 Q And do you recall the nature of that informa-
24 tion, was it anything more than had been available at
25 the first meeting?

Zimmerman

34

1
2 A Only additional quarterly or semi-annual state-
3 ments that have been published, since the first
4 meeting.

5 Q In other words, anything additional that you
6 recall was simply later in time as distinct from more
7 or --

8 A Later in time, the same type of information.

9 Q What was decided if anything at that second
10 meeting?

11 A Nothing.

12 Q Did you call a halt to the matter or did
13 you continue --

14 A Continued to discuss the matter, and continue to
15 accumulate additional information.

16 Q And who was going to be doing the accumulating,
17 you or Mr. Davis?

A Mr. Davis.

* * *

13 Q What happened next?

14 A A third meeting.

15 Q And when was that?

16 A Approximately one to four weeks later.

17 Q We had a good deal of spread in these lapses,
18 and can you attempt to fix when the third meeting took
19 place in terms of a calendar date?

A No.

* * *

18 Q Where did the third meeting take place?

A Lunch.

19 Q In Atlanta?

20 A Atlanta.

21 Q Who was present?

22 A Mr. Davis and I.

23 Q Anybody else?

24 A No.

25

3 Q Would you tell me what was discussed at
4 that luncheon meeting?

5 A No particular target, but at that time, we dis-
6 cussed ways and means of raising the funds to obtain
7 our objective.

8 Q And tell me what was said on that subject?

9 A We discussed alternative methods of raising funds.

10 Q What were they?

11 A Mr. Davis advised that he would attempt to talk
12 to various financial institutions that he was familiar
13 with, and had worked with, to see that if he could
14 handle the deal by himself, and alternatively, if he
15 could not, what I could work up in the way of a method
16 of raising the funds to obtain our objective.

17 Q And did you talk about any such possible
18 way that you could work up?

19 A No. I told him that I would think about it and
20 advise him.

21 Q But there was no mention at all of what any
22 such way might be?

A No.

17 Q What happened next?

18 A There was an extended period of time in which I
19 didn't hear from Mr. Davis other than casual remarks
20 at the tennis court or otherwise, that he was working
21 on ways to finance this particular idea.

22 Q Did you do anything that interim period?

23 MR. WILD: Please allow the witness to
24 complete his answer.

25 Q I thought you had. Had you, or not?

1
2 A At that time, I thought he had abandoned any
3 efforts on my part.

4 Q When you say you had thought he had aban-
5 doned any efforts on your part, what do you mean?

6 A That he was depending on some other method of
7 financing --

8 Q That he would come up with?

9 A That is correct.

10 Q Did you do anything in that interim period?

11 A No.

12 Q Did you give any thought to how you might
13 work up financing?

14 A No.

15 Q Did you talk to anybody about how you might
16 work up financing?

17 A No.

18 Q What happened next?

19 A Sometime in April, he advised me that his attempts
20 had not been successful, and would I contemplate a
21 method in which we could raise the desired money for
22 this business venture.

23 We discussed the amount of money needed,
24 and I told him that I would try, that I was not
25 positive that I could do it, because it was a very

Zimmerman

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unusual situation, and I was just not familiar with it.

Q Where did that discussion that you fix as being sometime in April take place?

A If I recollect, it was in Mr. Davis' office.

Q That would be a fourth meeting, is that correct, in the chronology that we have been tracing?

A To the best of my recollection, it would be a fourth meeting.

Q Was anybody else present?

A No.

* * *

4 Q Did Mr. Davis at that time show you any
5 memoranda or plans or anything else with respect to
6 this proposition that he had been discussing with you?

7 A Nothing more than financial information.

8 Q Financial information with respect to
9 what?

10 A Published financial information.

11 Q With respect to what entity?

12 A What we discussed previously.

13 Q With respect to NAB?

14 A Yes.

15 Q Anybody -- any other entity at that time?

16 A There was some other entities, but I don't recall
17 the names.

18 Q But in April, there still were some other
19 entities, is that correct?

20 A Yes.

21 Q Were they REITS?

22 A I don't recall.

23 Q Excuse me.

24 A I don't recall.

25 Q They may have and they may not have been?

Zimmerman

43

1
2 A Yes.

* * *

48 * * *

13 Q Do you recall anything else that was dis-
14 cussed at your fourth meeting with Mr. Davis which
15 you place as being in April?

16 MR. WILD: Let me just for purpose of
17 clarification, the meeting we are talking about
18 at which we had some testimony, the one that
19 was placed in April, is that correct?

20 MR. WACHTELL: Yes.

21 (Record read.)

22 A No.

23 Q You say that you discussed the amount that
24 would be needed. Would you tell me what the discussions
25 were on that score?

Zimmerman

49

1
2 A The discussions were we would need approximately
3 a million and a quarter dollars.

4 Q And was there any discussion of how that
5 sum was calculated?

6 A That the -- in relation to the stock value, how
7 many shares would be needed to influence and possibly
8 control the company.

9 Q What company were you talking about?

10 A At that particular time, we were talking about
11 HJB.

12 Q And would you tell me what the two
13 multipliers were, stock value as against number of
14 shares that you discussed which resulted in a --

15 MR. WILD: Rephrase the question. -

16 A What do you mean by multipliers and --

17 Q That resulted in the product of a million
and a quarter?

* * *

6 A I don't understand what you mean by multiplier.

7 Q You said that you discussed that you would
8 need approximately a million and a quarter dollars?

9 A Yes.

10 Q And that this was arrived at by taking into
11 account two factors, stock value, and how many shares
12 would be needed for the purpose you have indicated, I am
13 asking you simply, what was the dollar amount of the
14 stock value you were discussing, what were the number of
15 shares you were discussing? I will end the question
16 right there.

17 A At that particular time, the stock value was between
18 five and six dollars a share.

19 Q And how many shares were you talking about?

20 A To my knowledge at that time that there was approxi-
21 mately 1,250,000 shares outstanding from the latest
22 financial information that we had.

23 Q How many were you talking about buying?

24 A We will take a million and a quarter dollars, less
25 approximately \$150,000 for expenses, you would end up

Zimmerman

50a

1
2 with about a million one. We expected to buy it
3 on margin, so that we would have approximately \$2.2
4 million, and if you will divide the number of shares
5 into \$2.2, you will have an approximation of how many
6 shares we intended to buy.

7 (continued on next page.)

1
2 Q Mr. Zimmerman, I have assumed a total pur-
3 chase price of 2.2 million dollars. I have divided
4 that by five and a half dollars a share, being the mean
5 between the five to six dollar range that you indicated,
6 and I have come up mathematically with a quotient
7 of \$400,000.

8 Now, is that \$400,000; is that the approxi-
9 mately number of shares that you and Mr. Davis were
10 discussing at that meeting?

11 A No, we thought it would be less, because when we bought
12 it, we figured that the stock would probably move up
13 beyond the five and six dollar range that it was in; and
14 when we calculated it, we, I think used the figure
15 in the neighborhood of seven dollars. It was approximately
16 300,000 shares which would have been two million one.

17 Q Now, you testified that -- withdrawn.

18 You had testified before that you discussed
19 the amount needed and you have now testified that your
20 discussions were that approximately a million and a
21 quarter dollars would be needed which would result after
22 expenses, and after 50 percent margin in available funds
23 of 2.2 million dollars.

24 Was it the million and a quarter that Mr.
25 Davis was requesting you at that time to raise?

20 Q Was the million and a quarter that Mr.
21 Davis was asking you to see if you could figure out how
22 to raise?

23 MR. WILD: Answer yes or no.

24 A Yes.

25 Q Was there any discussion at that meeting as
to who or how the anticipated 1.1 million dollars of margin

Zimmerman

53

dollars would be raised?

(Question read)

MR. WILD: I object to the form of the question.

Q Was there any discussion at that time as to who would arrange for the anticipated 1.1 million dollars of margin borrowing?

MR. WILD: I object to the form of the question.

MR. WACHTELL: I will stand on the question.

MR. WILD: The witness may answer.

(Question read)

A Yes.

Q What was said on that subject?

A Mr. Davis was talking to -- advised me that he was talking to one or more people.

Q Did he identify any of them?

A The only one that I recall him identifying is Cantor and Fitzgerald.

Q And what did he say about that?

A That they would be the dealer-brokers, and would attempt to arrange the margin requirements.

* * *

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11 Q Did he say what he meant, Cantor, Fitzgerald
12 would be doing as a "dealer-broker"?

13 A They were to advise us on the purchase of the
14 stock, and would also purchase stock in the third market,
15 since they were not registered security dealers.

16 Q Did he say anything else they would do?

17 A Nothing that was not mentioned previously.

18 Q By that you mean, arrange margin financing?

A That has been mentioned previously, yes.

* * *

15 Q Now, with respect to this one and a quarter
16 million that was being discussed for you to see if
17 you could attempt to raise, was there any discussion as
18 to how you would go about doing that, at that meeting?

19 A At that particular meeting?

20 Q Yes.

21 A No.

22 Q You testified previously with respect to
23 that, that you told him that you would try, but it was a
24 "very unusual situation."

25 MR. WILD: The record will speak for itself

Zimmerman

62

1
2 is to what the previous testimony had been.

3 Q What did you refer to when you told Mr.
4 Davis that it was a very unusual situation?

5 A My previous experience had been in real estate
6 ventures, and this was completely new to me in relation to
7 SEC rules and so forth. The whole venture was different
8 from a real estate venture.

9 Q Was there a discussion as to SEC rules at that
10 meeting?

11 A Not at that meeting, no.

12 Q Was there anything said as to possible ways
13 in which you might go about trying to raise the one and
14 a quarter million dollars?

A No.

* * *

15 Q Did you indicate to him that you had the
16 financial resources, and were contemplating seeing
17 whether you wanted to come up with the one and a quar-
18 ter million yourself?

18 A No.

19 Q Did you discuss with him you contemplated
20 seeing if you could raise this from other people?

21 A Yes.

22 Q Did you indicate to him either by name or
23 description any of the people or persons that you were
24 talking about?
25

Zimmerman

64

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2

A No.

3

4

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8

A Not at that meeting.

9

10

11

12

13

Q How was the matter left, that you would think about it, or you would take soundings or what?

A We would have a fifth meeting at the attorney's office.

Q Between --

A Approximately a fifth meeting, I can't define.

* * *

Excerpts from Deposition of Jerome Zimmerman

69 * * *

3 Q Now, when did the meeting take place
4 in the lawyer's office?

5 A Approximately the 21st, 22nd of April.

6 Q Do you have any way of fixing the date?

7 A I beg your pardon?

8 Q Do you have any way of fixing the date?

9 A I could ask my counsel in Atlanta.

10 Q Other than that?

11 A I recall of no other way to fix that date.

12 Q Who was present?

13 A Counsel, Jarvis Levenson. David Rock. Bruce Davis
14 and myself.

15 Q Anybody else?

16 A Not that I recall.

17 Q Is that R-O-C-K?

18 A Yes.

19 Q These are both from the law firm?

20 A Yes.

21 Q What is the name of the law firm?

22 A Haas, Holland, Levison & Gibert.

23 Q In the period prior to that meeting, did
24 you do anything whatsoever with respect to seeking to
25 ascertain whether or not you would be able to raise
the million and a quarter or any part thereof?

Zimmerman

70

1

2

A No.

3

Q Did you talk to anybody about it?

4

A No.

5

Q Did you talk to anybody about it?

6

A No.

7

Q Did you talk to any business associate about

8

it?

9

A No.

10

Q What was discussed at the meeting?

11

MR. WELD: Objection.

12

MR. WACHTELL: What ground?

13

MR. WELD: Privilege.

* * *

8 Q Mr. Zimmerman, has D-2 ever purchased any
9 stock or other securities of any entity other than
10 REIT?

11 A Yes.

12 Q Can you identify the entity or entities
13 involved?

14 A I am not familiar with them.

15 I just have knowledge that there has been other
16 shares purchased.

17 Q When?

18 A I don't know the exact date.

19 Q Recently or at the inception of the company?

20 A Between the inception of the company, and today.

21 Q Do you know whether -- is the entity or
22 entities an REIT or REITS?

23 A No.

24 Q Do you know the total dollar amounts so
25 invested?

1 Zimmerman

76

2 A No.

3 Q Do you have any approximation?

4 A No.

13 Q Mr. Zimmerman, other than D-Z, would you
14 tell me what corporation, corporations or entities you are
15 affilliated with?

16 A What do you refer to by entities?

17 Q Partnerships, joint ventures, business trusts,
18 or other business entities of whatsoever description.

19 MR. WILD: I am going to object on the ground
20 that it is irrelevant. I will allow the witness
21 to answer.

22 (No response.)

23 Q Proceed, please, Mr. Witness.

24 MR. WILD: You may answer the question.

25 A I am president of a Apollo Forest Products.

1
2 I am vice president and assistant secretary of D-Z
3 Investment Company.

4 I am a partner in 14th Street.

5 I am on the board of governors of the Standard
6 Club.

7 Q I limited my question to business affiliations,
8 Mr. Zimmerman.

9 A I beg your pardon.

10 No public institution or social institutions,
11 is that correct?

12 Q Not under my present question.

13 A Redefine it for me again.

14 Q What business entity, corporations, joint
15 venture, partnership, individual proprietorship or
16 the like of a business nature, are you affiliated with?

17 A I am a licensed real estate salesman for the
18 First Fidelity Realty Group.

19 Q Anything else?

20 A I am president of E&L Services, a dormant
21 corporation.

22 Q You say a dormant corporation?

23 A It is not active.

24 Q When did it become dormant?

25 A Approximately the first quarter of 1973.

1
2 MR. MARSHALL: Read back the question,
3 please.

4 (Record read.)

5 Q Anything else?

6 A I am thinking, Mr. Wachtell.

7 That is all I can recall at the present time.

8 Q What is 14th Street?

9 A A real estate syndication, ownership of a piece
10 of property.

11 Q What is your position with that?

12 A A partner.

13 Q General or limited?

14 A I do not know whether it is a general partnership
15 or not.

16 Q When did you become a partner?

17 A Approximately February 1973.

18 Q And you continue to be such?

19 A At this moment, yes.

20 Q Are any of the other officers, directors,
21 stockholders, or note holders of D-Z involved in any
22 way in 14th Street?

23 A Yes.

24 Q And would you identify who those are?

25 A You would have to furnish me a list, so I can

1
2 identify them.

3 Q Is Mr. Davis?

4 A Mr. Davis, personally?

5 Q Yes, first.

6 A Mr. Davis personally is not involved in 14th
7 Street.

8 Q Security Management?

9 A Yes.

10 Q What is the role of Security Management in
11 14th Street?

12 A Partner.

13 Q Either of the Mr. Deckers, Mr. Ralph or
14 Mr. Saul Becker?

15 A No.

16 Q Except indirectly via Security, is that
17 correct?

18 MR. WILD: Objection to the form of the
19 question.

20 Q Are you aware that they are affiliated with
21 Security?

22 A Yes.

23 Q Any involvement that they have in 14th Street,
24 to the best of your knowledge is via an indirect involve-
25 ment via Security, is that correct?

1

2

A Yes.

3

4

MR. WILD: To the extent that it does not
require a legal conclusion, I will permit the
witness to answer.

5

6

Q Mr. Kroll?

7

A No.

8

Q Mr. Sophier?

9

A Yes.

10

Q What is his position?

11

A Partner.

12

Q The same type of partner as yourself in
security?

13

14

A Yes.

15

Q Mr. Levow?

16

A No.

17

MR. WILD: Who did you --

18

Q Mr. Levow?

19

A No.

20

Q Dr. Harold Levin?

21

A Yes.

22

Q The same type of partner?

23

A Yes.

24

Q Mr. Jacobson?

25

A No.

Zimmerman

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1

2

Q Mr. Weinberg?

3

A Yes.

4

Q Mr. Feinman?

5

A No.

6

Q How many partners are there in 14th Street?

7

MR. WILD: I am going to object as completely
irrelevant. I am going to allow the witness to
answer.

9

10

A I don't remember the exact number.

11

Q Can you give me your best approximation?

12

A Ten.

13

Q Who originally formed 14th Street?

14

A My attorneys.

15

Q Whose idea was it?

16

(continued on next page.)

Zimmerman

89

1
2 A Please explain to us what you mean specifically
3 by -- what you mean by the question.

4 Q In the same way that you described with
5 respect to B-2, how B-2 is an outgrowth of certain
6 discussions that you had with Mr. Davis. I am simply
7 asking you with respect to 14, who were the moving forces
8 originally --

9 A Security management and myself.

10 Q And then you went out and enlisted the other
11 people, is that correct?

12 A Correct.

13 Q And how much did each of the other people
14 invest?

* * *

Excerpts from Deposition of Jerome Zimmerman

Zimmerman

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Q -- other than yourself and Security?

A I have no records available to me now to give you a specific answer.

Q Would you give me your best recollection?

A By person?

Q Well, let's take Mr. Sophier.

A Approximately 20 to \$25,000.

Q Mr. Levin, Dr. Levin?

A Approximately \$50,000.

Q Mr. Weinberg?

A Approximately 45 to \$50,000.

Q Is 14th Street a limited partnership, to your best knowledge?

A I don't know. I don't recall.

MR. WACHTELL: I call for the production of the partnership agreement of 14th Street, and a list of the partners, together with the amount invested by each.

Defendant Trustees Exhibit 1 for identification is Schedule 13(d) dated May 3, 1974.

Defendant Trustees' Exhibit 2 for identification is amendment 1 to Schedule 13(d).

Defendant Trustees' Exhibit 3 for identification is amendment No. 2 to 13(d).

1
2 And Defendant Trustees' Exhibit 4 for
3 identification is amendment No. 3 to Schedule
4 13(d)

5 (Schedule 13(d) dated May 3, 1974 is
6 marked Defendant Trustees' Exhibit No.1 for
7 identification, this date.)

8 (Amendment 1 to Schedule 13(d) is marked
9 Defendant Trustees' Exhibit No. 2 for identifica-
10 tion, this date.)

11 (Amendment 2 to Schedule 13(d) is marked
12 Defendant Trustees' Exhibit No. 3 for identification,
13 this date.)

14 (Amendment 3 to Schedule (13(d) is marked
15 Defendant Trustees' Exhibit No. 4 for identification,
16 this date.)

17 Q I show you a document which has been marked
18 Defendants' Exhibit 1 for identification, and ask you
19 if you can identify it?

20 A Mr. Wachtell, did I advise you that during a
21 landing in Omaha, I lost 30 percent or more of my
22 hearing, and when I request you to repeat it, it is because
23 I hear your voice, but I do not distinguish the words.

24 Q I will attempt to keep my voice at a higher
level than I usually try to do.

1
2 A It is not that, if you will look at me directly
3 when you ask a question, then I will understand it
4 better.

5 Q Very fine.

6 Can you identify the document that I have
7 placed before you?

8 MR. WILD: Give Mr. Zimmerman an opportunity
9 to examine it.

10 A This is a Schedule 13(d).

11 Q And directing your attention to page 156
12 thereof, is that your signature?

13 A Yes.

14 Q Did you read this document before you signed
15 it?

16 A Yes.

17 Q And to the best of your knowledge and belief
18 at the time you signed it, was the information set forth
19 true, complete and correct?

20 A Yes.

21 Q As of the state of your present knowledge
22 and information, is there anything in that statement
23 that you would change, speaking as of May 3rd of 1974
24 the date in which you apparently signed this?

25 MR. WILD: It is not clear to me what your

question is.

MR. WACHTELL: I am asking the witness --
the witness has testified, and I hear his testimony,
that to the best of his knowledge and belief, when
he signed it on May 3rd, it was true, complete and correct
and I asked him if any information has come to his
attention since, that would lead him to want to
change anything in the 13(d) Schedule.

MR. WILD: Based on information --

MR. WACHTELL: Based on facts as it existed,
as of the date he previously signed it, May 3rd.

MR. WILD: Not --

MR. WACHTELL: Not subsequent events, as to
anything he has learned since, which makes him
think that there is something that he would desire
to change as at the date he originally signed it.

MR. WILD: No objection.

A No.

Q So I take it it is still your present knowledge
and belief that the information set forth in that state-
ment is true, complete and correct as of May 3rd, is
that correct?

A Correct.

Q Now, what building does 14th Street own?

1
2 A I don't know what building they own, sir.

3 I beg your pardon, 14th Street?

4 Q Yes. The partnership that you have been
5 testifying about, what building does it own, you testi-
6 fied it owned a building?

7 A I beg your pardon, I never said it owned a building,
8 I said it owned real estate.

9 Q Excuse me, were owners of a piece of property.
10 Was it a building?

11 A The original purchase of 14th Street was not
12 a building. It was vacant land.

13 Q Has 14th Street purchased any other property?

14 A Yes.

15 Q And what type of property?

16 A An apartment building.

17 Q Where?

18 A Contiguous to the original piece of property.

19 Q Has the original piece of property been
20 constructed upon?

21 A No.

22 MR. WILD: Let the record reflect the
23 entry of Michael W. Mitchell, Esq.

24 Q Prior to signing Defendant Trustees' Exhibit
25 1 for identification, had you ever signed any other

1
2 Schedule 13(d) with respect to any corporation or
3 entity?

4 A No.

5 Q How long had you known Mr. Davis?

6 A Approximately two years as of -- approximately
7 two years.

8 Q As of May of 1974, you knew him approximately
9 two years, that is what you are saying?

10 A Correct.

11 Q Had you ever had any business transaction
12 with Mr. Davis of whatsoever description prior to the
13 transaction which led to the formation of D-Z, and
14 other than 14th Street?

15 A No.

16 Q What knowledge or information do you have
17 as to the nature of Mr. Davis' business or business
18 affiliations?

19 MR. WILD: I object to the form of the
20 question. It is awfully broad.

21 MR. WACHTELL: I don't see what's broad
22 about it.

23 Q Answer the question.

24 A In the real estate construction and development
25 business.

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Q That is your understanding of the business that he was involved in, is that correct?

A Correct.

Q And is it your understanding that Security was the principal entity through which that business was conducted?

A Yes.

Q What is your understanding of Mr. Davis' position with Security?

A Chairman of the Board.

Q What else, if anything?

A That's my only understanding. Stockholder.

Q Do you know how much stock he owns?

A No, sir.

Q Do you have any information on that subject?

A No.

Q Have you ever asked?

A No.

Q Do you know if anybody else owns stock?

A No. -- I beg your pardon, yes.

Q Who?

A One of the Beckers.

Q Do you know which?

A No.

Q Do you know how much stock one of the Beckers

1
2 owns?

3 A No.

4 Q Have you ever participated in any real
5 estate syndication other than 14th Street? You or
6 any entity in which you are principal in interest?

7 MR. WILD: I will object on the ground
8 of relevance, but will permit the witness to
9 answer.

10 A Describe the word syndication to me, as you
11 understand it.

12 Q I believe I am taking your word. You
13 testified that 14th Street was a real estate syndication
14 involving an ownership of a piece of property.

15 MR. WILD: The record will stand as to whatever
16 the testimony may be. If Mr. Zimmerman is unable
17 to answer the question, without your definition,
18 I understand him not to --

19 Q Why don't you tell me, Mr. Zimmerman, what
20 you meant in your previous answer when you used the
21 term real estate syndication with reference to 14th
22 Street?

23 MR. WILD: I am not at all sure, Mr. Wachtell,
24 that that word was used.

25 MR. WACHTELL: Fine, I am quite sure, and

1
2 my notes reflect it, so let's move on. If it.
3 wasn't, it wasn't, but I am quite sure it was.

4 MR. WILD: Mr. Zimmerman recalled having
5 used the word or the phrase, real estate syndication,
6 I have no objection to his advising what he under-
7 stood that phrase to mean when he used it.

8 A I used it to mean a group of mutually -- of
9 people mutually known to each other, purchasing a
10 piece of property, because the value is excessive
11 for one person to engage in.

12 Q Is it your understanding of the word real
13 estate syndication or the words real estate syndication
14 that the words require that all of the participants
15 be mutually known to each other?

16 A All real estate transactions I have made have
17 been under those terms.

18 Q Putting aside those that you have made, is
19 it your understanding that the words real estate syndi-
20 cation necessarily require that all of the participants
21 be mutually known to each other, in other words, are
22 you aware that the words are used, and that other people
23 of real estate syndications were participants are not
24 necessarily mutually known to each other?

25 A I am not aware of that. I have never been engaged

1 in it.

2 Q You have never heard of any?

3 A I --

4 Q All your years in the real estate market,
5 have you ever heard of real estate syndications being offered
6 to the public?

7 A I have seen the word used, but I have never been
8 involved in it.

9 Q That wasn't my question. My question is
10 whether you had been aware that real estate syndications
11 are oftentimes offered to members of the general public
12 or large groups or others?

13 A I have seen it in the newspapers, yes.

14 Q Now, in terms of any real estate syndications
15 that you have previously been involved in, are there
16 others other than 14th Street?

17 A Currently outstanding?

18 Q No. Currently outstanding or pre-existing,
19 and no longer outstanding?

20 MR. HILD: Objection on the ground of rele-
21 vance, the witness may answer.

22 A I don't recall any at this moment.

23 Q Your best recollection as you sit here now
24 is that 14th Street was the first real estate syndication
25 that you were ever involved in?

1
2 A Correct.

3 Q Do you have any knowledge or information
4 of Mr. Davis having been involved in any real estate
5 syndication prior to 14th Street?

6 A I have no knowledge.

7 Q One way or the other?

8 A One way or the other.

9 Q I direct your attention to Defendant Trustees'
10 Exhibit 1 for identification, and to Schedule A thereto,
11 where there is information regarding the principal
12 occupations of the officers and directors of D-Z,
13 and under the heading Bruce R. Davis, in addition to
14 D-Z itself, and Security Management, he is listed as
15 "Executive vice-president of Pioneer Development Cor-
16 poration, Atlanta, Georgia, October 1968 to October 1969."

17 Do you have any knowledge or information
18 of the business that Pioneer was engaged in?

19 A No.

20 Q He also is shown as secretary of Security
21 Development & Investment Company in October 1968 to
22 October 1968.

23 Do you have any knowledge or information of
24 what business Security Development was engaged in?

25 A No.

1 Q Under the heading for your name, it says
2 private investor, June 1969 to February 1973.
3

4 Would you describe that principal occupation
5 in somewhat more detail.

6 MR. WILD: I object to the form of the
7 question. I will permit the witness to answer.

8 MR. WACHTEL: I will withdraw the question,
9 and record it for the moment.

10 Q Did you have any business occupation between
11 June of 1969, and February of 1973 other than private
12 investor?

13 A I was president of E&L Services.

14 Q Other than that?

15 A I was a consultant, business consultant.

16 Q In what industry?

17 A I was not engaged in any private consulting
18 in any particular industry, but in the field of manage-
ment and manufacturing.

19 Q Did you have an office as a consultant?

20 A At my home.

21 Q Is there any reason why in preparing Schedule
22 A you omitted any reference to that occupation?

23 A Nothing other than I am not presently engaged in.

24 Q Is it correct that you understood that
25 the information in Schedule A was not limited to present

1
2 occupations, but included the past ten years as well?

3 A In reading Schedule A, it says information re-
4 garding the present principal occupation in a material
5 occupation for the past ten years. I did not consider
6 it a material occupation.

7 Q Did you get income as a business consultant?

8 A Yes.

9 Q Would you give us the order of magnitude
10 of the gross income that you realized as a business
11 consultant in each of the years from June 1969 to February
12 of 1973?

13 A Approximately \$55,000.

14 Q What was the total span of time in which
15 you acted as a business consultant?

16 A Approximately six months.

17 Q And what was that period, which six months?

18 A Between 1970 and 1972.

19 Q You can't pin it down any more, is that
20 correct?

21 A I don't recall the exact dates, but I know it
22 was between that time.

23 Q But your role as a business consultant was
24 limited to some infinite six month or approximately
25 six month period within that two year spread, is that correct?

1
2 A I did one job.

3 Q For one client?

4 A One client, and it lasted approximately six months.

5 Q Anything other than that one job, and
6 one client, and EQL, did you have any occupation other
7 than other business occupation other than private
8 investor from June of 1968 to February of 1973?

9 A No.

10 Q What was the business of EQL?

11 A Apartment management.

12 Q How many apartment houses did it manage?

13 A Houses, I don't know.

14 Q Units?

15 A Units, approximately 1100.

16 Q What is Apollo Forest Products, Inc.?

17 A Lumber distribution.

18 Q Are you a stockholder?

19 A Yes.

20 Q Are you a principal stockholder?

21 A Yes, principal meaning more than 10 percent or --

22 Q How much do you own in percentage?

23 A Approximately 55,000 shares out of 80,000 shares.

24 Q Do any of the other persons who are affiliated
25 with D-Z as officers, directors, stockholders or noteholders,

Zimmerman

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1
2 have any interest or involvement in Apollo?

3 A No.

4 MR. WILD: You mean apart from perhaps
5 business transactions --

6 MR. WACHTELL: Apart from nothing.

7 I said an interest in?

8 A Whether they were --

9 Q Do any of the persons who are affiliated
10 with D-Z have any relationship to Apollo?

11 A What do you mean by relationship.

12 (Continued on following page)

1.

2 Q Anything, business transactions, ownership,
3 employment, contracts?

4 A Excuse me, Mr. Wachtell, can we do it word by
5 word?

6 Q No, let's take it generally, is there
7 anybody who is either an officer, director, stockholder,
8 or note holder of B-X, who has any business relationship
9 of whatsoever description with Apollo?

10 A Yes.

11 Q Who?

12 A Security Management.

13 Q And what is that business relationship?

14 A They are a customer.

15 Q And --

16 A I beg your pardon, they are not a customer
17 directly, but one of their projects is a customer.

18 Q For lumber?

19 A Yes.

20 Q Which project?

21 A I couldn't tell you specifically the name of
22 the project.

23 Q What are the volume of purchases in dollars?

24 A What period of time?

25 Q All periods.

A Since inception, since February 1973?

1
2 Q Since inception of the relationship.

3 A Approximately \$100,000.

4 Q And when did the relationship of the
5 indirect customer commence?

6 A I couldn't tell you specifically.

7 Q To the best of your recollection?

8 A Sometime since February of 1973.

9 Q Does it still continue?

10 A Not currently.

11 Q Construction has stopped for the time being?

12 A We are not selling them currently, and have not
13 sold them for approximately two months.

14 Q My question is, whether construction of the
15 project involved has stopped for the time being?

16 A I do not know.

17 Q Do you know whether the reason for the cessa-
18 tion of purchase is because they are purchasing from
19 somebody else, or they are not using that kind of lumber
20 right now?

21 MR. WILD: I object to the form of the
22 question. Two questions in one.

23 A I am not privy to that.

24 Q Do you have any reason to think they are
25 purchasing from somebody else, rather than Apollo?

1
2 MR. WILD: Objection.

3 MR. WACHTELL: On what ground?

4 MR. WILD: It calls for speculation.

5 MR. WACHTELL: Does he have any knowledge
6 or information or understanding or belief whether
7 they are purchasing from somebody else, other
8 than Apollo?

9 A I do not know.

10 Q Do you have any expectation of continuing to
11 sell them in the future?

12 A Yes.

13 Q Or their project?

14 A Yes.

15 Q Now, the exhibit, Defendant Trustee's
16 Exhibit 1 shows 420 14th Street, Northwest, as being
17 the office of D-Z.

18 A What page is that --

19 Q Both on the cover, and in Item 2 on page
20 1.

21 Is that the offices of Security?

22 A Yes.

23 Q And is that likewise the offices of Mr.
24 Davis and Mr. Ralph Becker?

25 A Yes.

Q Do Mr. Davis and Mr. Ralph Becker maintain

1
2 their offices at Security?

3 A Yes.

4 Q Do you know any other business entities that
5 maintain their office at the same suite or group of
6 offices?

7 MR. WILD: Other than Security and D-Z?

8 Q Other than Security, D-Z, Mr. Ralph Becker,
9 and Mr. Davis?

10 A I do not know anyone else that occupies it.

11 Q Is there any lease between D-Z and Security
12 and Mr. Davis or Mr. Becker, with respect to the use
13 of those premises?

14 A I am not aware of one.

15 Q Is there any rental?

16 A I am not aware of one.

17 Q Is there any agreement for the payment of
18 any rental?

19 A I am not aware of one.

20 Q Does D-Z have any secretarial or clerical
21 employees of its own?

22 MR. WILD: I will object to the form of the
23 question. You indicate what you mean of its
24 own.

25 A I am not aware of any.

13 Q Do you know, does D-Z utilize clerical
14 employees of Security?

15 A Yes.

16 Q Do you know whether there exists any under-
17 standing or agreement for any payment as between D-Z
18 and Security for such secretary assistance?

19 A I am not aware of any.

20 Q Do you know whether there exists any
21 agreement between D-Z and Security with respect to
22 overhead expenses, telephones or the like?

A I am not aware of any.

8 Q What, to your knowledge or information is
9 any business affiliation between Mr. Ralph Becker
10 and Mr. Davis?

11 A Ralph Becker is president of Security Management.

12 Q Do you know of any other business activity
13 that Mr. Ralph Becker engaged in other than Security?

14 A I am not aware of any.

15 Q Am I correct in understanding that Mr.
16 Ralph Becker and Mr. Saul Becker are brothers?

17 A Yes.

18 Q What is your knowledge or information as to
19 the business activities of Mr. Saul Becker?

20 A Real estate brokerage.

21 Q Have you had any prior business transactions
22 with either of the Beckers, prior to D-2?

23 A Business activities?

24 Q Business transactions of whatsoever trans-
25 action, any business relationship together, against each

1
2 other, contracts, purchases, sales, syndications,
3 offices, anything.

4 MR. WILD: Are you speaking of in their
5 individual capacities?

6 MR. WACHTELL: We have already -- it is a
7 good point, Mr. Wild. We have already pinned
8 down a prior syndication between this witness
9 and Security, so, to that extent that would be
10 an indirect relationship with Mr. Ralph Becker.

11 Other than that, my question is all-encompassing.

12 MR. WILD: Including in their capacities as
13 officers and directors?

14 MR. WACHTELL: Yes.

15 A I have a real estate salesman's license with Mr.
16 Saul Becker's firm.

17 Q That is the license that you referred to
18 previously?

19 A If I referred to it previously, that is what it
20 is.

21 Q Do you receive compensation from Mr. Becker
22 in a fixed amount?

23 A No.

24 Q Do you receive commissions if you in fact
25 are successful as a broker on any particular transaction?

Zimmerman

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A Not as a broker.

3

Q Or otherwise as --

4

A As a realty salesman.

5

Q Do you receive a commission or a portion

6

thereof, if you are successful as a real estate salesman

7

in any particular transaction?

8

A Yes.

9

Q And does he receive a portion of such

10

commission?

11

A Yes.

12

Q How long has that relationship been in

13

existence?

14

A December 1972.

* * *

1
2 Q Yes. The gross commissions that you
3 have realized as a real estate salesman in connection
4 with Mr. Saul Bocker's firm since September of 1972?

5 A Not having records present, my recollection is
6 approximately \$35,000 to \$45,000.

7 Q Now, Mr. Zimmerman, directing your attention
8 to page 1 of Defendant Trustee's Exhibit 1 for identifica-
9 tion, the statement appears "The voting stock of
10 D-Z is owned in equal shares by Jerome Zimmerman and by
11 Security Management Company, Inc."

12 Will you tell me what that voting stock is,
13 what type of stock?

14 A To the best of my knowledge, it is common stock.

15 Q How many shares do you own?

16 A Fifty shares.

17 Q How much did you pay for it?

18 A One hundred dollars per share.

19 Q Or Five Thousand Dollars all tolled?

20 A Yes.

21 Q Is it, likewise, accurate then, that fifty
22 shares are owned by Security?

23 A Yes.

24 Q What did Security pay for its shares?

25 A One hundred dollars per share or five thousand

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Zimmerman

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dollars.

3

Q Does D-Z have -- I will withdraw that.

4

5

How much of that common stock of D-Z, to your knowledge, or information, is authorized to be issued?

* * *

Q Do you understand?

20

21

22

A I understand what you are saying now. My answer is I do not recall the total number of shares authorized.

23

24

25

Q Does D-Z have any other series of stock authorized, such as a non-voting common, a preferred stock, or any other type of stock whatsoever?

1

Zimmerman

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2

A No.

3

4

Q Does D-Z have any other -- does D-Z have any warrants authorized?

5

A No.

6

7

8

Q It is correct that D-Z has certain promissory notes authorized, is that correct?

A Yes.

* * *

25

Q I show you Defendant Trustee's Exhibit 4, for

Zimmerman

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1
2 identification, which is amendment No. 3, it is pre-
3 sumably the document you are asking for.

4 A According to Schedule B of this document, it is
5 \$500,000.

6 Q Now, can we agree that Schedule B to that
7 document shows \$500,000 of six percent promissory notes
8 due March 31, 1975, as having been issued, is that
9 correct?

10 A Correct.

11 Q My question is, what amount was authorized
12 to be issued of such promissory notes?

13 A To my recollection, \$1,250,000.

14 Q And in what document or documents does
15 that authorization appear?

A In the private placement memorandum.

* * *

13 MR. MARSHALL: The document I am handing
14 over to Mr. Wachtell is entitled "D-Z Investment
15 Company, Private Placement Memorandum, for the
16 issuance of up to \$1,250,000 of six percent
17 promissory notes due March 31, 1975. That memo-
18 randum is dated on the first page, in the upper
19 right-hand corner, April 24, 1974.

20 Additionally, there are three exhibits
21 appended to this private placement memorandum,
22 Exhibit 1 appears to be excerpts from the provi-
23 sions of the Articles of Incorporation of D-Z.
24 Exhibit 2 is entitled D-Z Investment Company,
25 six percent promissory note, due March 31, 1975.

Zimmerman

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1
2 And Exhibit 3 is entitled certificate and purchase
3 order.

4 I am now turning over this document, and
5 when I say document, it includes the exhibits
6 appended to it, Mr. Wachtell, for inspection.

7 MR. WACHTELL: I will mark the document so
8 ably described by Mr. Marshall as Defendant's
9 Exhibit 5 for identification.

10 (Document entitled "D-2 Investment Company
11 Private Placement Memo" was marked Defendant
12 Trustee's Exhibit 5 for identification.)

13 MR. WACHTELL: Let's adjourn for lunch.

14 (Whereupon, at one o'clock, the hearing
15 was adjourned for lunch.)

2:15 P.M.

J E R O M E Z I M M E R M A N, resumed

EXAMINATION BY (CONTINUED)

MR. WACHTELL:

Q I show you Plaintiff's Exhibit 5 for
identification, and ask you if you have ever seen it
before?

* * *

122 * * *

A I have seen this document before.

Q When did you first see it?

A Approximately April 24, 1974.

Q Did you read it at that time?

A I beg --

Q Did you read it at that time?

A Yes.

Q Who prepared Defendant Trustees' Exhibit 5
for identification?

A The law firm of Haas, Holland, Levison and Gibert.

Q Who participated in the preparation in the
furnishing of information to be incorporated in such an
offering circular?

A Mr. --

MR. WILD: I am going to object to the
characterization of this. It is called a private
placement --

1

Zimmerman

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MR. WACHTELL: Wasn't it --

3

MR. WILD: It is captioned "Private place-

4

ment."

5

Q Excuse me, Exhibit 5, private placement

6

Memorandum.

7

Who furnished information to be incorporated

8

in this memorandum, Defendant Trustees' Exhibit 5 for

9

identification?

10

A Are you asking this question other than the members

11

of the law firm?

12

Q Yes.

13

A Mr. Davis and myself.

14

Q Anybody else?

15

A Not that I recall.

* * *

6 Q Was this memorandum ever amended subsequent
7 to its preparation in the form in which it presently
8 exists as Defendant Trustees' Exhibit 5 for identification,
9 bearing date of April 24, 1974?

10 A There was an amendment planned. Whether it has
11 been finalized, I am not currently aware.

12 Q When was an amendment planned?

13 A Within one week of its issuance.

14 Q What was, to your best knowledge, the
15 change or changes that were planned to be made by
16 such amendment?

17 A The reference to the escrow account.

18 Q Where in the Exhibit 5 are you referring
19 my attention, what page?

20 A 6, the bottom of the page, and the top of page 7.

21 Q Are you talking about the paragraph beginning
22 with the words "Other than the \$100,000" on the bottom
23 of page 6, and concluding with the words "shall be
24 returned without interest" at the top of page 7?

25 A Yes.

1

Zimmerman

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2

Q And what was the nature of the amendment that

3

was being proposed, as you recall?

4

A That there would be no escrow account.

5

Q You are characterizing something as an escrow

6

account, the word escrow does not appear in the para-

7

graph, and I prefer not to have any characterization.

8

Are you saying that there would not be any

9

such limitation to the company's use of the proceeds

10

prior to at least \$500,000 being received?

11

A Yes.

* * *

17

Q Was any other change or changes in the

memorandum contemplated, as you recall?

18

A No.

* * *

128 * * *

25

Q Now, referring to Exhibit 3 for identification,

Zimmerman

129

1
2 and directing your attention to the bottom of page 7
3 thereof, the caption "Issue of Units under small issue
4 registration."

5 Did you and Mr. Davis prior to April 24,
6 1974, have any discussion between yourselves or with
7 anybody else with respect to the subject matter of
8 that paragraph?

9 A Lot me read it.

10 Q Surely.

11 A Possibly one or two days prior to April 24th.

12 Q And would you tell me what that discussion
13 was?

14 A The discussion was with our legal firm who
15 drew this as an original, and --

* * *

9 Q Mr. Zimmerman, did you discuss the subject
10 of this proposed offering of a unit of common stock,
11 and two year promissory notes with anybody other than
12 attorneys?

13 A No.

14 Q Did you discuss it with Mr. Davis?

15 MR. WILD: Please note another appearance.

16 A Mr. Davis was present when it was discussed with
17 the attorney.

18 Q Did you ever discuss it with Mr. Davis
19 outside of the presence of attorneys?

20 A No.

Q Whose idea was it --

* * *

4 Q -- to have future offering of units of
5 this nature?

6 A It was a mutual decision of attorney, Mr. Davis,
7 and myself.

8 Q Was any contemplation given by yourself
9 as to who the potential purchasers of such units would
10 be?

11 A At what time, Mr. Wachtell?

12 Q At the time that it was determined first
13 to have such units in the future?

14 A Not specifically.

15 Q Was it contemplated that in all likelihood
16 the people who would buy the original issue of notes
17 would ultimately buy the future units?

18 A Yes.

19 Q And was this discussed?

20 MR. WILD: With whom?

21 MR. WACHTELL: With anybody.

22 Q First, was it discussed with Mr. Davis?

23 A An attorney at the same time.

24 Q Does there exist any agreement or agreements
25 with any of the persons who purchased the original
series of notes of D-Z, first let me limit my question

1
2 to agreements in writing, which gives any such person
3 an option or call or other right of first refusal,
4 or what have you, to participate in the offering of
5 the future units?

6 A There is nothing that exists outside of this
7 document.

8 Q So that you are saying -- by this document,
9 as I correct, does not expressly state that a purchaser
10 of the original series of notes would have the right to
11 purchase the future units, is that correct?

12 MR. WILD: The document speaks for itself,

13 Mr. Wachtell.

14 A All I know is, Mr. Wachtell, is what I know is
15 in this private placement memorandum.

16 Q So the best of your knowledge, there exists
17 no written agreement, whereby a purchaser of the
18 original series of notes would have a right to purchase
19 the future series, if he so desires, is that correct?

20 A I would repeat, that there is nothing that
21 exists outside of this private placement memorandum.

22 Q But it is correct that it was your under-
23 standing at the time that a purchaser of the original
24 series of notes would have such right, is that correct?

25 MR. WILD: I am objecting to the improper

1
2 characterization of the prior testimony.

3 Q Was it your understanding at the time,
4 back in the latter part of April of 1974, that somebody
5 who purchased the notes, the original series, would
6 have the right, if he so desired, to participate in
7 the future units?

8 MR. WILD: When you say understanding, are
9 you talking about an understanding that he may have
10 had with himself or with others?

11 MR. WASHTELL: I said his understanding,
12 in his mind, did he so understand that that was
13 what was contemplated.

14 A My total understanding was in this private place-
15 ment memorandum.

16 Q No, I am going to insist on a answer. I can
17 read the memorandum. I am asking you if you understood,
18 and intended back in the latter part of April of 1974,
19 that a person who purchased the original notes would have
20 the right, if he so desired to participate in the po-
21 tential future offer of units?

22 A I have no thoughts about it at all other than what
23 exists in this document.

24 Q And what you have testified was discussed?

25 A Yes.

Q Well, were your thoughts in any way different than what was discussed, or were your thoughts --

A Discussed where or with whom?

Q You testified about certain discussions with Mr. Davis, and with lawyers on this subject, and I am simply asking you was your understanding and intention contrary in any way to what was then discussed on this subject?

MR. WILD: You are speaking now of his personal intention.

MR. WACHTELL: His personal subjective state of mind, was it contrary to what he testified was discussed?

A No.

Q Now, Mr. Zimmerman, I would like to ask you with reference to Defendant Trustees' Exhibit 5 for identification, to direct your attention to page 4 thereof.

A Yes.

Q Under the caption "Business Activity Of The Company. Initially the company intends to acquire an interest in a real estate investment trust, REIT. In order to retain the confidentiality of the acquisition so that purchasers might be at the most favorable price the company does not intend to disclose the REIT common

1
2 stocks, and will be accumulated until such time that
3 the company is required to disclose such information
4 in accordance with Section 13 of the Securities Exchange
5 Act."

6 Is the REIT there referred to HJB Prime?

7 A Yes.

8 Q Now, I would like to direct your attention
9 to Defendants' Exhibit 1 for identification?

10 A I don't have it, sir.

11 Q That is the 13(d) and I place a copy before
12 you, the original 13 (d) and would like to ask you to
13 show me where in that 13(d) it is disclosed that it
14 was D-Z's intention to purchase 300,000, approximately
15 300,000 shares of HJB?

16 MR. WILD: Mr. Wachtell, the document speaks
17 for itself. I object to the form of the question.
18 I direct the witness not to answer.

19 MR. WACHTELL: You are directing the witness
20 not to answer?

21 MR. WILD: Yes.

22 Q Mr. Zimmerman, directing your attention to
23 Defendants' Exhibit 1 for identification, I would like
24 you to show me where in that document it reflects the
25 fact that D-Z will issue up to \$1,250,000 of its 6

Zimmerman

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percent promissory notes to March 31, 1975.

MR. WILD: Mr. Wachtell, I raise the same objection, and direct the witness not to answer.

Q Mr. Zimmerman, when you signed and certified to the completeness and accuracy of that document, on or about May 8th of 1974, you were aware of the subject matter of this April 24th memorandum, including the material set forth on page 2 thereof. "Promissory notes to be issued. The company will issue up to \$1,250,000 of its 6 percent promissory notes dated March 31, 1975." Is that correct?

MR. MARSHALL: Where are you reading from?

MR. WACHTELL: Page 2.

A Yes.

(Continued on following page)

1
2 Q Did you state to anybody that you thought the
3 document you were signing should reveal that fact?

4 A I didn't hear the last part of your statement.
5 I requested you to talk to me; now you were talking
6 to the wall.

7 Q Did you state to anybody that you thought
8 that the document you were signing should reveal that
9 fact?

10 A Who would anybody be, sir?

11 Q Anybody in the world, did you state to
12 them in words or in substance here in the memorandum
13 that we have had prepared, we have set forth that
14 we "will issue up to \$1,250,000 of six percent promissory
15 notes due March 31, 1975."

16 How come we are not disclosing that in the
17 13(d) that we are filing with the Securities & Exchange
18 Commission? Did you state that to anybody in words
19 or substance before you signed Exhibit 1?

20 A No.

21 Q Did you state to anybody in words or sub-
22 stance before you signed Exhibit 1 "How come we are
23 not disclosing the fact that we intend to buy approxi-
24 mately 500,000 shares of HJB?"

25 A No.

Zimmerman

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1 Q Did you discuss with anybody in words or
2 substance how come we are not disclosing the fact that
3 we are contemplating a new financing in September of
4 new \$50,000 units of \$45,000 promissory notes, plus
5 equity? Did you state that to anybody in words or substance?

6 A No.

7 Q You know at the time you signed this docu-
8 ment, Exhibit 1, on or about May 3 of 1974, that that
9 was being contemplated, is that correct?

10 MR. WILD: Objection.

11 MR. WACHTELL: What ground?

12 MR. WILD: Give me just a moment. The
13 date of the signing is May 3.

14 MR. WACHTELL: Excuse me.

15 Q Would your answer to any of my prior questions
16 be different if I had used the date which appears on page
17 6 of Exhibit 1, which Mr. Wild tells me is May 3,
18 rather than the date of May 3 that I inadvertently
19 used?

20 A No.

19 Q At the time that you signed Schedule 13(d),
20 Exhibit 1, on or about May 3 of 1974, is it correct
21 that you were aware that D-Z intended prior to September
22 1 of 1974 to register for sale with the Georgia Securities
23 Commissioner units consisting of common stock and two-
24 year six percent promissory notes pursuant to Section
25 5(d) of the Georgia Securities Act of 1973?

Zimmerman

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1 A Yes.

2 Q Is it correct that at the time you signed
3 Schedule 13(d), Exhibit 1, on or about May 3 of 1974,
4 you were aware that it was contemplated that such units
5 would be issued to consist of \$50,000 packages comprising
6 a \$45,000 two-year promissory note, and four shares of
7 the common stock of the company, D-Z?
8

9 A Yes.

Zimmerman

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1
2 Q Does D-Z have an Executive Committee?

3 A No.

4 Q Does there exist any agreement between
5 yourself and security in writing in the nature of a
6 stockholders agreement of any form whatsoever?

7 A No.

8 Q Does there exist with any of the noteholders
9 of D-Z any agreement of whatever description other than
10 an agreement in the precise form of a document or
11 documents which are exhibits to Defendant Trustee's
12 Exhibit 5 for identification?

13 A No.

14 MR. WILD: I don't understand the question.

15 A There is no other agreement other than this
16 agreement, with note holders.

* * *

12 Q Would you direct your attention to, in
13 the first place, Exhibit 3, which is a part of Defendant
14 Trustee's Exhibit 5 for identification, which is a
15 form captioned certificate and purchase order; and
16 then would you direct your attention to Exhibit 2 to
17 that Defendant Trustee's Exhibit 5 for identification,
18 which is a form of promissory note, and I ask you
19 whether there exists with any of the noteholders of
20 D-Z any agreement of whatsoever description other than
21 an agreement or promissory note in the precise form
22 of Exhibits 2 and 3 which are exhibits to Exhibit 5,
23 unamended, nothing added, no side agreements or the
24 like?

MR. WILD: May the witness have an oppor-

1 Zimmerman

2 tunity to examine Exhibit 2 and 3 to --

* * *

9 Q Answer that question. I will take an
10 answer to that question. Do you have any knowledge
11 of any stockholder signing anything different than
12 Exhibit 2 or 3 or anything additional thereto, two or
13 three to Exhibit 5?

14 A I have no knowledge that that has been done at
15 this time.

16 Q Very good.

17 Now, would you please direct your attention
18 to Defendant's Exhibit 4 for identification, which is
19 Amendment No. 3 to the Schedule 13(d), and particularly,
20 to the last sheet thereof: And there is a schedule
21 there which purports to be "information regarding the
22 purchases of the six percent promissory notes referred
23 to in Item 3," et cetera.

24 Now, there is a list of names and addresses .
25 of purchasers; the first of which is Security Management

1
2 Company, Inc.

3 Is that the company that is likewise a
4 fifty percent stockholder of DeZ?

5 A Yes.

6 Q Do you have any knowledge or information
7 of the agreements with reference to the purchase of
8 such notes by Security being in any manner different
9 than those of the remaining persons on this list?

10 A No.

11 Q The next person on this list is Jerome
12 Zimmerman.

13 Is that yourself?

14 A Yes.

15 Q I will ask you the same question as to your
16 purchase of the notes?

17 A No.

18 Q And you are the other fifty percent stock-
19 holder, is that correct?

20 A Yes.

21 Q Now, Bernard Kroll, is the next name that
22 appears on this list; would you tell me to your knowledge,
23 who Mr. Kroll is.

24 A Mr. Kroll is president of Holder Construction
25 Company.

Zimmerman

Q And what business is Holder engaged in?

A Construction.

Q When did you first meet Mr. Kroll?

A Approximately three to four years ago.

Q How well do you know him?

MR. WILD: Objection to the form of the question.

Q Do you know him well?

MR. WILD: I don't know what the word "well" means.

Q Describe your entire relationship and the nature thereof with Mr. Kroll from the time you first met him.

A I served on the Board, on the Board of Governors of the Standard Club of Atlanta, Georgia. I served on a committee with him, I think it was the House Committee at the Standard Club. He is now president of the Standard Club, and I am still on the Board of Governors, and working with him.

I know him socially at the Standard Club. And I have discussed selling lumber to him for his construction company, and that is it.

(continued on next page.)

Excerpts from Deposition of Jerome Zimmerman
Zimmerman

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1
2 Q Is Mr. Davis a member of the Standard
3 Club?

4 A Yes.

5 Q Is he an officer on the Board of Governors?

6 A No.

7 Q Does he have any role other than pay dues
8 and eat lunch, and go to the steamroom?

9 A I do not know, sir.

10 Q Does Mr. Davis know Mr. Kroll?

11 A Yes.

12 Q To your knowledge, or information, how
13 well -- what is the relationship, can you describe it,
14 between Mr. Davis and Mr. Kroll, and how far back
15 does it go?

16 A I do not know, sir.

17 Q Have you ever discussed with Mr. Kroll in
18 any way, shape or form, any possibility that if D-Z
19 were successful in acquiring a REIT that business might
20 ultimately result from Mr. Kroll's construction company?

21 A No.

22 Q Directly or indirectly?

23 A No.

24 Q Now, other than having purchased a hundred
25 thousand of these six percent promissory notes, do you

1
2 have any knowledge or information of any business rela-
3 tionship that Mr. Kroll has with D-Z, with Security,
4 with yourself, with Mr. Davis, with either of the
5 Beckers?

6 A No.

7 Q Who is Mr. Kroll's lawyer?

8 A I don't know.

9 Q Who is Mr. Kroll's accountant?

10 A I don't know.

11 Q Does Mr. Kroll have an investment advisor
12 to your knowledge or information?

13 A I don't know.

14 Q Does Mr. Kroll have a broker to your knowledge
15 or information?

16 A I don't know.

17 MR. WILD: You are talking about a securities
18 broker?

19 MR. WACHTELL: Yes. I should hope if he
20 had a real estate broker or salesman, that would
21 be Mr. Zimmerman, perhaps.

22 MR. WILD: I am sure Mr. Zimmerman would
23 have the same hope.

24 MR. WACHTELL: Hope springs eternal.

25 MR. WILD: Yes, it does.

1
2 Q Mr. Sophier, the next --

3 A Sophier --

4 Q The next name on this sheet. How long have
5 you known Mr. Sophier?

6 A I have known Mr. Sophier approximately twenty
7 years; possibly longer.

8 Q Does Mr. Davis know Mr. Sophier, to your
9 knowledge?

10 A Yes.

11 Q Do you know how long Mr. Davis has known
12 Mr. Sophier?

13 A No.

14 Q Describe your relationship with Mr. Sophier.

15 A Social.

16 Q Anything else?

17 Anyone other than this participate in the
18 prior syndication?

19 A No. Ask that question again, please.

20 Q Anything else other than his participation
21 in the prior syndication, I am trying to avoid duplication.

22 The witness previously testified that Mr.
23 Sophier was a partner in who invested approximately 20
24 or 25,000 dollars in the 14th Street real estate syndi-
25 cation.

1
2 A Nothing prior to that.

3 Q Anything subsequent to that, other than
4 D-Z Investment in notes?

5 A No.

6 Q What is his business?

7 A Manufacturer of leather belts -- of belts.

8 Q What?

9 A Manufacture of belts.

10 Q Now, do you know whether Mr. Kroll has
11 any business relationship -- whether Mr. Sophier has
12 any business relationship with Mr. Kroll, Mr. Levow,
13 Dr. Levin, Mr. Jacobson, Mr. Weinberger, Mr. Feiman,
14 other than their common investment in the notes of
15 D-Z?

16 A Mr. Sophier, and Mr. Levow are partners.

17 Q In the manufacture of belts?

18 A In the manufacture of belts.

19 Q Other than that, do you know of any business
20 relationship between Mr. Sophier and any of the other
21 people on this list starting with Mr. Kroll?

A No.

* * *

24 Q Mr. Zimmerman, going back to Mr. Kroll,
25 do you know of any business relationship between Mr.

1
2 Kroll and any of Messrs. Sophier, Levow, Levin, Jacobson,
3 Weinberg and Feinman, other than their investment in
4 these notes of D-2?

5 A Social.

6 Q The question was business.

7 A No.

8 Q Directing your attention to Mr. Levow, how
9 long have you known him?

10 A Twenty years or more.

11 Q Describe the relationship briefly, the
12 nature thereof?

13 A Social. His wife was a friend of my sister's,
14 and was in our home frequently in their early youth.

15 Q Have you ever had any business relationship
16 with Mr. Levow of any description whatsoever?

17 A No.

18 Q Was Mr. Levow offered the opportunity to
19 participate in the real estate syndication that his
20 partner, Mr. Sophier participated in?

21 A Yes.

22 Q I take it he turned it down?

23 A He turned it down.

24 Q Let's go back to Mr. Sophier, do you know
25 who his attorney is?

1
2 A No.

3 Q The same question, Mr. Levin?

4 A No.

5 Q Do you know who their accountant is or
6 accountants are?

7 A No.

8 Q Do you know whether they have an investment
9 advisor?

10 A No.

11 Q Do you know who their securities broker is
12 or are?

13 A No.

14 Q Dr. Levin, how long have you known Dr.
15 Levin, if you know him?

16 A Thirty years.

17 Q Have you ever had any business relationship
18 with Dr. Levin of any description whatsoever other
19 than prior to his purchase of these D-2 notes other
20 than his investment of approximately \$20,000 in the
21 real estate syndication 14 Street?

22 A No.

23 MR. WILD: Apart from doctor-patient rela-
24 tionship?

25 MR. WACHTELL: Is that a business rela-
tionship?

1
2 MR. WILD: I don't know. Your client --

3 MR. WACHTELL: We use it as a profession.

4 Q Mr. Zimmerman, do you know whether there
5 exists any business relationship other than the prior
6 real estate participation between Dr. Levin and any
7 of Messrs. Kroll, Sophier, Levow, Jacobson, Weinberg
8 and Peinman other than their purchase in common of
9 these notes?

10 A No.

11 Q Do you know who Dr. Levin's attorney is?

12 A No.

13 Q Do you know who his accountant is?

14 A Leventhall, Harwood & Harwood.

15 Q When did you learn that?

16 A Within the past two to three years.

17 Q At the time of the real estate syndication?

18 A Possibly.

19 Q Do you know if they are still his accountants?

20 A I have not heard him say they weren't.

21 Q Did they participate in any way to your
22 knowledge in his purchase of the notes of D-Z?

23 A Did they participate -- they being who, sir.

24 Q Laventhol, Kreckstein?

25 A They didn't participate --

1
2 Q I don't mean participate financially, do
3 you know whether they reviewed any material or whether
4 he consulted them in connection therewith?

5 A I don't know.

6 Q Does he have an investment advisor, do you
7 know?

8 A I don't know.

9 Q Do you know who his securities broker is, if
10 he has one?

11 A No.

12 Q Mr. Jacobson, how long have you known Mr.
13 Jacobson?

14 A Thirty years or more.

15 Q What does he do, business-wise?

16 A He is the president of National Service Industries --
17 he is president of National Linen Service, a division of
18 National Service --

19 Q He is in the linen supply --

20 A National Linen Service is in the linen supply
21 business.

22 Q Have you ever had any business relationship
23 with Mr. Jacobson of any shape or form prior to his
24 investment of these notes?

25 A Yes.

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Q And what was that?

A Participation in the purchase of apartment projects.

Q How many such projects?

A To the best of my knowledge, two.

Q And what was the nature of the participation?

A Ownership.

Q Together?

A With others.

Q How many others?

A I don't remember, sir.

Q When?

A Starting back in the 1950's.

Q How many partners were there?

A I don't remember.

Q Twenty, thirty, forty or two or three, what is the order of magnitude?

A Less than 40, and more than two.

Q More than thirty?

A No.

Q More than twenty?

A No.

Q More than ten?

1
2 A I don't recall.

3 Q Who formed these -- who, to use the collo-
4 quial term, who was the promoter of it, who put the
5 deal together?

6 A I did.

7 Q And he came in essentially as an investor?

8 A Yes.

9 Q Did any of these other people on the sheet
10 that we are looking at, come in to any such projects?

11 A No.

12 Q Who is Mr. Jacobson's attorney?

13 A Haas, Holland, Levinson & Gibert.

14 Q And that is the same firm that was repre-
15 senting D-Z in the sale of these notes, and the organiza-
16 tion of this corporation, is that correct?

17 A They represent D-Z, yes.

18 Q And they were representing them in the trans-
19 action which resulted in Mr. Jacobson purchasing \$50,000
20 of these six percent notes, is that correct?

21 A I don't know whether they represented them about.

22 Q Represented D-Z, I didn't ask --

23 A They represented D-Z, yes.

24 Q In the transaction which resulted in
25 Mr. Jacobson's buying six percent promissory notes,

Excerpts from Deposition of Jerome Zimmerman
Zimmerman

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1
2 \$50,000 worth from D-Z, is that correct?

3 A Yes.

4 Q And that law firm also represents Mr.
5 Davis, is that correct? And his other --

6 A Not his total representation.

7 Q But they are his counsel in some matters?

8 A Yes.

9 Q Other than D-Z?

10 A Yes.

11 Q Do you know who Mr. Jacobsen's accountant
12 is?

13 A No.

14 Q Do you know whether he has an investment
15 advisor?

16 A No.

17 Q Do you know whether he has a broker,
18 securities broker?

19 A No.

20 Q Mr. Weinberg --

21 A Dr. Weinberg.

22 Q Dr. Weinberg is an optometrist?

23 A No.

24 Q What is his profession?

25 A Obstetrician and gynecologist.

Q How long have you known Dr. Weinberg?

A Twenty years, approximately.

Q Have you ever had any business relationship with Dr. Weinberg other than his participation of the extent of \$45,000 to \$50,000 in 14th Street syndicate?

A No.

Q How about since then, and prior to D-Z?

A Only 14th Street and D-Z.

Q Do you know who Dr. Weinberg's attorney is?

A No.

Q Do you know who his accountants are?

A No.

Q Do you know whether he has an investment advisor?

A No.

Q Do you know whether he has a securities broker?

A No.

Q Do you know whether he has ever had any business relationship other than the real estate syndicate with any of Messrs. Kroll, Sophier, Levow, Levin, Jacobson and Feinman?

A No.

1
2 Q Mr. Ronald Feinman, how long have you known
3 him?

4 A Dr. Ronald Feinman --

5 Q Dr. Ronald Feinman, how long have you known
6 him?

7 A Approximately five years.

8 Q What is his specialty?

9 A Orthodontics.

10 Q Have you ever had any business relationship
11 with Dr. Feinman prior to this?

12 A No.

13 Q Do you have any knowledge if he has had
14 any business relationship with any other person on this
15 sheet?

16 A No.

17 Q Do you know who his attorney is?

18 A No.

19 Q Do you know who his accountant is?

20 A No.

21 Q Do you know whether he has an investment
22 adviser?

23 A No.

24 Q Do you know whether he has a securities
25 broker?

1

Zimmerman

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2

A No.

3

Q Do you know whether he invests in securities?

4

A No.

5

Q Do you know the same question as to Dr.

6

Weinberg?

7

A No.

8

Q As to Mr. Jacobson?

9

A No.

10

(continued on next page.)

11

1

2

Q As to Dr. Levin?

3

A No.

4

Q As to Mr. Lovew?

5

A No.

6

Q As to Mr. Sophier?

7

A No.

8

Q As to Mr. Kroll?

9

A No.

10

Q Do you know whether Dr. Feinman has

11

significant business and investment experience?

12

A No.

13

Q Do you have any knowledge or information

14

whether Mr. Davis knows that Dr. Feinman has significant

15

business and investment experience?

16

A No.

17

Q Do you know whether Dr. Weinberg has

18

significant business and investment experience?

19

A Yes.

20

Q What is the basis of your knowledge?

21

A He and his father-in-law own a number of real
estate parcels.

22

Q Other than that, do you have any knowledge

23

as to whether he has any significant business and

24

investment experience?

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A No.

Q Do you know whether Mr. Davis has any knowledge about whether Dr. Hainberg has significant business and investment experience?

A No.

Q Do you know whether Dr. Levin has any significant business experience?

A Yes.

Q What is the basis of your knowledge?

A He and his father-in-law participated in real estate ownership.

Q Do you have any other knowledge or information which would indicate that he has significant business and investment experience?

A On one occasion, I took Dr. Levin to his bank, and -- not took him, I sent him to his bank, because he advised me that he had a considerable amount of cash in a checking account, and suggested that he get advice from them as to how to invest it.

Q When was that?

A The past two to three years.

Q How much money did he have in the checking account?

A He didn't advise me. It was considerable, that's

1
2 all I know.

3 Q Did you have any understanding as to the
4 order of magnitude of how many dollars were involved?

5 A No.

6 Q Was it your understanding that the amount
7 involved was of such magnitude that it was more than the
8 amount that one leaves lying around, uninvested, and un-
9 realizing income in a checking account?

10 A Yes.

11 Q And that's why you advised him he ought to
12 do something about it, is that correct?

13 A Yes.

14 Q And I take it you thought that it was kind
15 of silly to have a lot of money lying around in a
16 checking account unaccounted for?

17 A Yes.

18 Q Do you think that showed a lot of sophistica-
19 tion on his part to do that?

20 MR. WILD: I object to the question. I
21 direct the witness not to answer.

22 Q Do you know where Dr. Feinman got the \$50,000
23 that he used to purchase the notes of D-27?

24 A No.

25 Q Do you know where Dr. Weinberg got the \$50,000?

1
2 A I have no personal knowledge of where he got it.

3 Q Do you have any understanding or information
4 on the subject?

5 A No.

6 Q Do you have any knowledge where Mr. Jacobson
7 got his \$50,000?

8 A No.

9 Q Do you have any knowledge where Mr. Levin
10 got his \$50,000?

11 A No.

12 Q Do you have any knowledge where Mr. Levon
13 got his?

14 A No.

15 Q Do you have any knowledge where Mr. Sophier
16 got his?

17 A No.

18 Q Do you have any idea where Mr. Kroil got
19 his \$100,000?

20 A I think Mr. Kroil advised me he borrowed it.

21 Q He borrowed it?

22 A Yes.

23 Q Did he indicate to you from whom he borrowed
24 it?

25 A A bank.

Q Did he indicate -- did he indicate the

1
2 bank?

3 A I believe it was the Mercantile National Bank.

4 Q Of Atlanta?

5 A Of Atlanta, Georgia.

6 Q The entire \$100,000?

7 A Yes.

8 Q Did he advise you of that before he purchased
9 the notes?

10 A He advised me of what, sir?

11 Q Mr. Kroll apparently purchased the \$100,000
12 in two installments, \$50,000 and then another \$50,000?

13 A Yes.

14 Q When in reference to this sequential pur-
15 chase that you learned from him that he had borrowed
16 the money for the purpose of buying these notes from the
17 Mercantile National Bank?

18 A Prior to his borrowing it.

19 Q And was that prior to the first \$50,000?

20 A Prior to the \$50,000.

21 Q Was there any reason why Mr. Kroll proceeded
22 in two separate installments of \$50,000 each?

23 A I have no knowledge of why he bought two \$50,000.

24 Q Is it your understanding that he borrowed
25 the entire \$100,000 from the Mercantile National Bank?

1
2 A Yes.

3 Q Did you ever discuss that with your lawyers?

4 A No.

5 Q Do you know what interest rate Mr. Kroll
6 was paying to the bank?

7 A No.

8 Q Did you understand that it was in excess
9 of 6 percent?

10 A Yes.

11 Q Did you have any discussion with Mr. Kroll
12 on the subject of why he should borrow money from a
13 bank for in excess of 6 percent in order to buy a auto
14 which pays 6 percent?

15 A No.

16 Q Did you ever obtain or did D-Z ever obtain
17 to your knowledge or information from any of Messrs.
18 Kroll, Sophier, Levow, Jacobson, Weinberg or Feinman
19 a written statement as to their financial resources?

20 A --

21 Q At or about the time that they purchased
22 this note?

23 A A written statement?

24 Q Yes.

25 A No.

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Q A statement as to their investment objectives generally?

* * *

A We received no written statement.

175 * * *

Q Do you know the net worth of each of these gentlemen?

A I don't know my own net worth.

Q Do you know whether the net worth of each of these gentlemen is in excess of \$150,000?

A I know that it is, because I asked them, and referred them to this paragraph when they signed this private placement memorandum.

Q Other than that, did you receive any substantiation or did you see any documentation or financial statement or net worth statement or anything whatsoever that would establish this fact other than the recital in the paragraph ??

A No.

Q Can you give me the dates upon which of these noteholders, and I am going to use the term noteholders for convenience of reference, and now I will back up, starting with Security at the top of the page, purchased the notes listed on the schedule?

A I don't have the exact dates available to me.

* * *

13 Q Can you give me your best recollection
14 now. Let's take yourself and Security.

15 When did you put in your \$50,000, and when
16 did Security put in its money?

17 A To my best recollection, I can't give you the
18 exact date. It was the day or one or two days following
19 this private placement memorandum.

20 Q So it would be approximately the 25th
21 or 26th of April, is that correct?

22 A Somewhere from the 24th on, yes.

23 Q And how did you make your investment of
24 the \$50,000, was that by check?

25 A I wrote a check, yes, sir.

1

2

Q To D-Z or some other entity?

3

A D-Z.

4

Q D-Z was already then in existence, is that

5

correct?

6

A When I wrote the check, yes.

7

Q How did Security make its \$50,000 investment?

8

A I don't know, sir.

9

Q When to your best recollection, did Mr. Kroll

10

make his two \$50,000 investments?

11

A I think I have told you, sir, I don't remember

12

the exact date.

13

Q Was it at a later date?

14

A Later than what, sir?

15

Q Later than yourself and Security's?

16

A I was the first one, yes.

17

Q You were the first one?

18

A Yes.

19

Q How long was Security after you?

20

A I don't know, sir, I didn't make that deposit.

21

Q Do you have any knowledge or information

22

that bears on the subject of when they made yours?

23

A No.

24

Q How long after you made yours, to your best

25

knowledge and recollection, did Mr. Kroll make his two?

1 A I don't remember.

2 Q Mr. Sophier?

3 A I think Mr. Sophier and Mr. Levow made it within
4 a week after I made mine.

5 Q That would be approximately the beginning
6 of May?

7 A Within one week after I made mine.

8 Q How about Dr. Levin?

9 A Approximately the same period of time.

10 Q How about Mr. Jacobson?

11 A I don't recall, sir.

12 Q How about Dr. Weinberg?

13 A I don't recall.

14 Q How about Dr. Feinman?

15 A According to these 13 (d)'s, his was made between
16 the second and third amounts.

17 Q I may say, if it is any assistance to you,
18 that Dr. Weinberg's was made subsequent to the original
19 financing as well.

20 A I can take the 13(d)'s and make them --

21 Q Other than that you don't have any independent
22 recollection now?

23 A No.

24 Q Except you recall it was later, is that correct?
25

1
2 A I beg --

3 Q Except you recall it was later than the initial
4 investor, is that correct?

5 A Yes.

6 Q How much time elapsed between the Mr. Kroll
7 two \$50,000 investments?

8 A I don't understand the question.

9 Q How much time elapsed between Mr. Kroll's
10 two \$50,000 investments?

11 A Could you refer to the 13(d) and give us an
12 approximation.

13 Q Can you give me your best recollection
14 independent of what the 13(d) would indicate?

15 A No, sir.

16 Q Who originally contacted Messrs. Kroll,
17 Sophier, Levow, Levin, Jacobson, Weinberg, and Feinman
18 with respect to the possibility of their wishing to
19 invest in D-2?

20 A Can we take them one at a time?

(Question read)

21 A In the case of Mr. Kroll, it would be both Mr.
22 Davis and myself; not together.

23 Mr. Sophier, I approached.

24 Mr. Levow, I approached.
25

1 Dr. Levin, I approached.

2 Mr. Jacobson, I approached.

3 Dr. Weinberg, I approached.

4 Dr. Feinman, I don't know who approached him.

5 Q You did not?

6 A No.

7 Q With respect to Mr. Kroll, who approached
8 him first, you or Mr. Davis?

9 A I couldn't tell you, sir. I could only tell
10 you that I approached him.

11 Q You also indicated that Mr. Davis approached
12 him. You said the two of you approached him, but
13 not together?

14 A Correct.

15 Q At the time that you first spoke to him,
16 was it your understanding that it was your understanding
17 that you were first broaching the subject or that he
18 had been already --

19 A I don't know if he had been spoken to by Mr.
20 Davis.

21 Q Did he indicate in the conversation whether
22 you were telling him something that was brand new or
23 whether --

24 A He didn't indicate this in the conversation that
25 he had talked to Mr. Davis.

1
2 Q Was it your understanding at the time that
3 you were the first person that he was hearing about
4 this possible transaction from?

5 A I had no understanding to that effect.

6 Q One way or the other?

7 A One way or the other.

8 Q When was it that you first contacted Mr.
9 Kroll?

10 A I couldn't give you the exact dates.

11 Q When was it in reference to April 24th of
12 1974?

13 A After that.

14 Q After April 24th?

15 A Yes.

16 Q After the preparation of Exhibit 5, is that
17 correct?

18 A Yes.

19 Q Did you have any discussion whatsoever,
20 did you in any way directly or indirectly mention to
21 Mr. Kroll prior to the preparation of Exhibit 5 for
22 identification that you would be talking to him, that
23 you might be talking to him, that you had a possible
24 transaction or anything else of that nature, did you
25 mention the subject to him, prior to the preparation of
Exhibit 5?

1

2

A No.

3

Q The same question as to Mr. Sophier?

4

A No.

5

Q Same question as to Dr. Levin?

6

A No.

7

Q Same question as to Mr. Jacobsen?

8

A No.

9

Q Same question as to Dr. Weinberg?

10

A No.

11

Q In what manner did you first contact Mr.

12

Kroll?

13

A By telephone.

14

Q And what did you tell him?

15

A I had a business proposition that I would like
to discuss with him.

16

17

Q What did he say?

18

A I can't recall precisely what he said. I said
I had been advised by counsel that I could not discuss
it with him by phone, that I would have to see him in
person, and that I would have to give him a copy of
the private placement memorandum.

19

20

21

22

23

24

25

I also advised him that the minimum investment
was \$50,000, and that he would have to be qualified
under the terms of the private placement memorandum,

1 *Excerpts from Deposition of Jerome Zimmerman*
2 which I read to him.

3 Q The entire memorandum or some portion of it?

4 A The financial portion.

5 Q Would you specify which portion of the Exhibit
6 5 you read to him on the telephone?

7 A I didn't read anything to him. I gave it to him
8 in my own words, as outlined here.

9 Q Would you please point out to me what
10 material in Exhibit 5 you gave to Mr. Kroll on the
11 telephone in your own words?

12 A I will, as soon as I find it, sir.

13 Q Thank you.

14 A I advised him that he would be purchasing this
15 note for investment, and that it could not be syndicated
16 with anyone else.

17 I advised him that the minimum purchase was \$50,000,
18 because we had planned a future offering, as was outlined
19 in the placement memorandum, and only 25 people could
20 be involved.

21 I advised him that he would have to have personal
22 net worth in excess of double the amount of the note,
23 or in any case, more than \$150,000.

24 I expressed to him that I could not mail him
25 anything and I could not tell him on the phone, that
 the only way I could do it was person to person.

1
2 Q When you contacted Mr. Kroll, as you
3 have described, by telephone, did you have before you
4 or in your possession any notes or memorandum or
5 guidelines or script or other material directing you
6 or suggesting to you what you should or should not
7 say?

8 A No.

9 MR. WILD: Excepting the placement memorandum
10 that the witness testified that he did have.

11 MR. WACHTELL: The placement memorandum
12 speaks for itself. I don't think it is within
13 the ambit of the question.

14 MR. WILD: You asked him about the document.

15 MR. WACHTELL: I didn't. My question was
16 very precise.

17 Q What did he say?

18 A He said he would like to talk to me about it.

19 Q Did he say that his net worth was not worth
20 loss than \$100,000?

21 A He understood what I said to him. He didn't
22 specifically say his net worth was anything.

23 Q Did you ask him to confirm in that telephone
24 conversation that his net worth was not less than \$150,000?

25 A I asked him to confirm whether I could talk to

1
2 him under the conditions of this private placement
3 memorandum.

4 Q He did not say to you, you did not put to
5 him the question whether his net worth was at least
6 \$150,000, is that correct?

7 A I don't recall whether I specifically put that
8 question to him.

9 Q Do you recall anything else of the telephone
10 conversation?

11 A That we would get together for lunch.

12 Q Did you do so?

13 A Yes.

14 Q When?

15 A Approximately a week -- within a week after that.

16 Q Where?

17 A Couch & 6 Restaurant.

18 Q Who paid?

19 A I don't recall.

20 Q Do you have an American Express card or
21 similar credit card that you use at restaurants?

22 A No, I am one of the foolish people that pay cash.

23 Q I don't know if it is so foolish. If you
24 didn't pay cash, my next question would have been to
25 ask you to search your records for the date. Perhaps

1 you are wiser than most other people.

2 Do you know of any way of fixing that
3 date?
4

5 A No.

6 Q Has anybody else present other than yourself
7 and Mr. Kroll?

8 A The restaurant was full, sir.

9 Q Please, Mr. Zimmerman, was anybody else
10 present at the discussion that took place at the luncheon
11 between you and Mr. Kroll?

12 A No.

13 Q Tell me what was said?

14 A In general, I explained to him that we were interested
15 in obtaining control or influence on management, a REIT.

16 I could not divulge the REIT to him, until such time
17 as we had filed a 13(d).

18 I reviewed this private placement memorandum
19 with him, explaining to him that he would receive a
20 notice that the -- and I went through it page by page.

21 Q Did you give him a copy at that time?

22 A Yes.

23 Q You testified a moment ago that in the
24 telephone conversation you indicated to him that the
25 minimum investment would be \$50,000, because you eventually

Zimmerman

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were going to have --

A A limit of 25.

Q A limit of 25?

A Yes.

Q Were you referring, I believe you were, but I want to be sure, were you referring to the proposed offering of a package of the \$45,000 note and four shares of common stock?

A I was not referring to that specifically. I was referring to the fact that as is outlined in this private placement memorandum, you could not have more than 25 in an unregistered registration -- I mean, a non-public registration.

Q That is indicated in this memorandum in that portion of the memorandum which refers to the proposed issue of a unit of \$45,000 promissory note, and four shares of common stock. Was that what you were referring to when you spoke to him?

A I was referring to the fact that we had to raise \$1,250,000. If you divided that by 25, the minimum investment would have to be \$50,000.

* * *

7 Q Mr. Zimmerman, did you tell Mr. Kroll any-
8 thing that does not appear in Defendants' Exhibit 5
9 for identification at that luncheon meeting?

10 A In reference to the D-Z purpose?

11 Q Yes. In reference to anything having to
12 do with D-Z. I am not interested in what you may have thought
13 about the pool having too much chlorine or anything
14 like that; anything to do with D-Z. Did you tell him
15 anything whatsoever that is not in Exhibit 5?

16 A Not to the best of my knowledge.

17 Q Did you discuss with him, when you went down
18 this Exhibit, page by page, whether if he were to purchase
19 \$50,000 of the promissory notes due in March of 1975,
20 whether he would be given the opportunity to translate
21 that \$50,000 investment into one of the units of \$45,000,
22 two year notes, and four shares of common stock?

23 A I did not discuss that with him.

24 Q Was there any discussion on the subject?

25 A No.

1
2 Q Would you tell me what -- would you recall
3 for me your understanding of what the prime rate was in
4 or about the latter part of April and the early part
5 of May of this year?

6 A Approximately 8 percent, 9 percent.

7 Q Would you tell me what you told Mr. Kroll
8 at that luncheon meeting, as to why he should invest
9 \$50,000 in a 6 percent promissory note due in March
10 of 1975 and callable at the instance of D-Z prior thereto?

11 MR. WILD: I object to the form of the
12 question as being argumentative, and I direct
13 the witness not to answer.

14 Q Mr. Zimmerman, did you indicate anything
15 to Mr. Kroll in this conversation as to why he should
16 make this investment, and why you were suggesting
17 to him to buy these notes?

18 A That we expected to make a profit out of it,
19 in the manner that was described in this private place-
20 ment.

21 Q Did you discuss with him how he, as the
22 owner of a 6 percent promissory note due in March of 1975,
23 and callable prior thereto, would you participate in
24 this anticipated profit?

25 A I believe I referred him to the note in which

1 when explained -- let me look at this information.

2 In general, I expressed to him that if we were
3 in control or had influence on management, that we could
4 help this REIT market value back to its book value or
5 in excess of, and with that, we would be able to do
6 whatever was possible down the road, which are outlined
7 in our 13(d). Which I outlined in our 13(d), which
8 would give him a profit on his investment.

9 Q Mr. Zimmerman, perhaps I think we are taking
10 this at cross-purposes.

11 You have told me things that you told him
12 that you contemplated doing which would make an invest-
13 ment in this unnamed REIT profitable to D-Z.

14 What I am asking you is what, if anything, did
15 you tell him as to how he, the holder of a 6 percent
16 promissory note due in March of 1975, and callable
17 prior thereto, would share in this hoped for profit
18 that D-Z would realize by its investment in this
19 unnamed REIT?

20 A Mr. Machtell, as far as I knew of, I only gave
21 him the information that was related in this private
22 placement memorandum.

23 Q Would you point out to me where in the private
24 placement memorandum, and you have been testifying that
25

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1
2 you told him these great profits that were hoped for,
3 would you show me where in the private placement memorandum
4 there is anything that says how a noteholder is going to have
5 any share in these profits, how the noteholder is going
6 to get anything other than 6 percent on his note,
7 unless and until the note matures or is previously
8 called?

9 A I guess it is possible in my mind that he would
10 exercise his \$80,000 to get into the small issue regis-
11 tration.

12 Q That's what I am trying to find out. Was that
13 what you discussed with him, that it was --

14 A I did not discuss it with him, I just assumed that
15 he understood it, or --

16 Q Did you understand that he would have the
right to do that?

* * *

15 Q Mr. Zimmerman, do you know the branch of the
16 Mercantile National Bank from which Mr. Kroll made the
17 loan?

18 A I beg your pardon?

19 Q Do you know the branch -- is the Mercantile
20 National Bank from which Mr. Kroll made his loan?

21 A I think it is the main office.

22 Q Main office?

A Yes.

* * *

9 Q Now, Mr. Zimmerman, getting back to your
10 luncheon conference with Mr. Kroll, did you say to him
11 in words or substance that if he were to buy the 6½
12 promissory notes, that he would be given the opportunity
13 to translate them into the small issue offering when that
14 offering was made as contemplated?

15 A That was my understanding. Whether it was conveyed
16 to Mr. Kroll or not, I cannot recall.

17 Q Did you at that luncheon furnish Mr. Kroll
18 with any document other than an exact copy of Exhibit 5?

19 A Not that I recall.

20 Q Did you in that conversation identify the
21 REIT to Mr. Kroll?

22 A I don't recall whether it was after we had filed
23 the 13(d) or not. If it was prior to that, I emphatically
24 did not give him the name.

25 Q If it was after, you did?

1
2 A If it was after the 13(d), yes.

3 Q Well, Mr. Kroll's name as to the first \$50,000
4 appears in the first 13(d), does that help you in placing
5 the time of the conversation as being prior to the 13(d)?

6 A That I would not have given him in that information.

7 Q Did you give him any financial information
8 with respect to NJB?

9 A I don't recall giving him any information -- finan-
10 cial information with respect to NJB. I could not have
11 given him any information with respect to NJB, because I
12 couldn't tell him the name.

13 Q So you didn't give him any annual reports,
14 you didn't give him any 10K's, you didn't give him any
15 10K's, you didn't give him any quarterly reports, you
16 didn't give him any proxy statements, you didn't give him
17 any S-1's or prospectuses, is that correct?

18 A If I was not going to give him the name, I could
19 not give him any financial statements.

20 Q Did you ever yourself give or cause to be
21 given any such information to Mr. Kroll?

22 A I don't recall ever having done so.

23 Q Do you have any knowledge or information that
24 Mr. Kroll has ever been furnished with any financial data
25 with respect to NJB?

1
2 A I don't recall --

3 Q I am going to ask you now the same question
4 with respect to all the other gentlemen on this list, which
5 is part of Exhibit 4 for identification; to wit, Messrs.
6 Sophier, Levow, Levin, Jacobson, Weinberg and Feinman?

7 MR. WILD: Repeat the question.

8 MR. WACHTELL: I will.

9 Q Did you either furnish to those gentlemen at
10 any time or do you have any knowledge or information of
11 anybody else acting on behalf of D-Z, furnishing to any
12 of those gentlemen at any time any financial or other
13 information with respect to NJB, including, but not
14 limited to annual reports, quarterly reports, 10K's, 8K's,
15 proxy statements or prospectuses or registration state-
16 ments?

17 A I don't recall furnishing them any such information.

18 Q Is it your best understanding that no such
19 information was ever furnished to them by anybody acting
20 on behalf of D-Z?

21 A That, I cannot answer.

22 Q You have no information or reason to believe
23 that any such information was furnished to any of those
24 people by anybody acting on behalf of D-Z, is that
25 correct?

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Zimmerman

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2

A I have no information that any such information was
3 furnished to them on behalf of D-Z.

* * *

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23

Q Mr. Witness, has there ever been prepared
24 any financial statements for D-Z?

24

A I have never seen one.

25

1
2 Q Has there ever, to your knowledge or informa-
3 tion, been prepared any pro forma financial statement for
4 D-Z, meaning by pro forma, any statements setting forth
5 what the financial status or balance sheet of D-Z would
6 be when the notes were sold?

7 A I have not seen one.

8 Q Do you have any knowledge or information of
9 such financial status or pro forma financial statement
10 having been furnished to any other persons who purchased
11 notes of D-Z?

12 A No.

13 Q Do you have any knowledge of any of these
14 note holders, and I have previously indicated to you what
15 I meant by that, Mr. Sophier, Mr. Lovin, Mr. Levow,
16 Weinberg or Feinman, was any information presented to
17 them, based on any information or knowledge that you have
18 with respect to the financial condition of Security?

19 A No.

20 Q With respect to your financial condition?

21 A No.

22 Q Did you tell Mr. Kroll that it was antici-
23 pated that D-Z would purchase approximately 300,000 shares
24 of this unknown REIT, and I am referring to the luncheon
25 meeting?

1
2 A I believe I outlined to him generally what we planned
3 to do with the million and a quarter dollars when raised.

4 Q Did you have any discussion with him as to
5 what was being contemplated to be done with the RETT, if
6 the acquisition of control or interest, as you described
7 it, was successful?

8 A We hoped to benefit by increasing the value of the
9 stock to the extent that, when any of the possibilities
10 would arise, that we had in mind, would give us financial
11 profit.

12 Q Did you discuss what the plans were for the
13 RETT that would result in this desirable state of affairs?

14 A We did not discuss firm plans. There were none.
15 They were all based on suppositions after we found out
16 the exact status of the trust.

17 Q Did you discuss with him how E-Z proposed to
18 repay the million and a quarter in notes?

19 A No.

20 Q Did you discuss with him that D-Z would not
21 have to repay it, because they would be translated into
22 the small offering?

23 A The small offering still had notes.

24 Q In the first place, I am talking about the
25 notes that would become due in March. You did not discuss

1
2 with him how those notes would be repaid, is that correct?

3 A Correct.

4 Q You have testified it was your understanding
5 that the note holders would have the right to translate
6 into the small offering, and you are not sure whether you
7 did or did not communicate this specifically to Mr. Kroil
8 at that luncheon. Did you discuss with him how the notes
9 which were contemplated to be issued in the small offer-
10 ing, the \$45,000 notes, two year duration were antici-
11 pated to be repaid by D-Z?

12 A No.

13 Q How did you understand that these million
14 dollars of notes were contemplated to be repaid?

15 A Possibly one or several ways.

16 Q Tell me what those ways were, as you under-
17 stood it.

18 A Possibly a merger as outlined in 13(d).

19 Q If there was a merger, are you then saying
20 that it was your understanding that the notes would be
21 repaid from the assets of MJB?

22 A No, sir.

23 Q From the assets of the new combined company?

24 A I made no specific recommendations of how it was
25 to be done. No recommendations could be made until such

1
2 time as we found out the exact financial status and made
3 plans after that.

4 Q I am simply getting your understanding. You
5 said that one of the possibilities was that the money
6 would be repaid as a result of a merger, and I am asking
7 you, was it your understanding, if in the event of such
8 merger, that the \$1 million would be essentially repaid
9 from the assets of HJB itself?

10 A Not necessarily.

11 Q Did you communicate with any other person
12 with respect to the possibility of buying any of these 66
13 promissory notes due in March of 1975 other than the
14 persons listed on Schedule B of Exhibit 4?

15 A Excuse me, Mr. Wachtell, would you say that again?

16 Q Take a look at the schedule which you have
17 been looking at, which is the list of people who purchased
18 notes on the latest 13(d) amendment, which is Exhibit 4.

19 A Yes, sir.

20 Q I have asked you now whether you communicated
21 with any other person or entity with respect to any pos-
22 sible interest in purchasing any of the remaining prom-
23 issory notes?

24 A Yes.

25 Q Who?

1
2 A Specifically I can't give you their names. I have
3 a telephone directory for my own use, and from that, I
4 contacted some of the people that I have talked to in re-
5 lation to other investments.

6 Q Can you give me the name of any one such
7 person?

8 A Sanford Orkin.

9 Q Any other?

10 A (No response.)

11 Q Can you recall the name of any other?

12 A Bernard Cohen.

13 Q Any other?

14 A Milton Rozin.

15 Q Any other?

16 A Louis Taratto.

17 That's all I can recall at this time.

18 Q Do you have that telephone directory with you?

19 A No, sir.

20 Q If you were to look at that telephone direc-
21 tory, would it permit you to refresh your recollection as
22 to the identity of others contacted and you communicated
23 with in this matter?

24 A Possibly could.

25 Q Did you maintain any record or any list or

1
2 any tick mark or anything else at to the identify of the
3 persons with whom you communicated?

4 A No, sir.

5 Q Were you instructed to maintain a record of
6 the name of the persons with whom you communicated?

7 A I don't recall that I was.

8 Q You have no recollection of ever having been
9 instructed to keep a record of people who you solicited
10 to buy notes of D-2, is that correct?

11 A I do not recall having been so instructed.

12 Q And you did not keep any such record?

13 A No.

14 Q Did you use any source for potential inves-
15 tors of these notes other than that telephone directory?

16 A No.

17 Q How many names are in that telephone direc-
18 tory, would you estimate?

19 A Maybe 100.

20 Q Do you have any knowledge or information of
21 whether Mr. Davis, either of the Mr. Beckers or any other
22 person acting on behalf of D-2 communicated with any per-
23 son with respect to the possible purchase of any of these
24 notes?

25 A No.

1
2 Q You don't have any knowledge or information
3 one way or the other or to your best knowledge or infor-
4 mation they did not do so?

5 A I don't have any knowledge one way or the other
6 whether they did or didn't.

7 Q Did you ever have any discussion with Mr.
8 Davis in which you discussed whether you, the two of you
9 should coordinate how many people you were communicating
10 with to be sure you didn't get too many people?

11 A Mr. Davis was going to take care of all the other
12 work, and I was going to take care of raising the money.

13 Q That was your primary area of responsibility?

14 A As I understand it, he had no intentions of soli-
15 citing anyone or presenting this business venture to any-
16 one.

17 Q You did indicate that you had understood that
18 he had contacted Mr. Kroll independent of you, is that
19 correct?

20 A I don't think that he necessarily contacted him in
21 relation to sell him. I think he contacted him in rela-
22 tion to the fact that they are social friends, and fre-
23 quently visited each other homes.

24 Q In any of your conversations with any person,
25 did any of them volunteer the name of anybody else who

1
2 might be interested?

3 A No. I never requested that information.

4 Q And nobody ever volunteered it, is that cor-
5 rect?

6 A Yes.

7 Q Who is Mr. Orkin, what is his business?

8 A Retired.

9 Q How old is he?

10 A Early 40's.

11 Q What was his business before he prematurely
12 retired?

13 A Orkin Exterminating Company.

14 Q Who is Mr. Cohen?

15 A Mr. Cohen is in the scrap iron business.

16 Q Who is Mr. Rozin?

17 A Mr. Rozin is a private investor, retired.

18 Q Who is Mr. Taratto?

19 A Mr. Taratto is president of Site Singer, a secondary
20 load recovery company.

21 Q Did you furnish copies of Defendant Trustee's
22 Exhibit 5 for identification, the memorandum, to each of
23 these gentlemen?

24 A Yes.

25 Q Did you furnish them anything else?

A 510

Excerpts from Deposition of Jerome Zimmerman
Zimmerman 221

1
2 A No.

3 Q Did any of the persons who purchased notes
4 file any statement in writing or furnish any statement
5 in writing to D-Z designating any person as their offeror
6 representative or advisor in connection with the purchase
7 of the notes?

8 A I don't know what offeror representative is.

9 Q Somebody who represents an offeror.

10 A I still don't know what you are saying. I don't
11 know what offeror is.

12 Q An offeror is somebody to whom an offer is
13 being made, in this case, notes.

14 Did any of those persons to whom these notes --

15 A Excuse me, an offeror is someone whom an offer is
16 being made notes? One of them is animate, and the other
17 one is inanimate.

18 MR. WACHTELL: Will the reporter please read
19 back what I said.

20 (The record was read.)

21 A What is the question?

22 Q The question is whether any of the persons who
23 purchased the notes furnished any statement in writing, any
24 statement in writing to D-Z designating any person as their
25 offeror representative or advisor?

Zimmerman

222

1
2 A No.

3 Q Are you still continuing at this time to
4 solicit persons to purchase these notes?

5 A No.

6 Q When did you stop, if you did stop?

7 A I beg your pardon, sir?

8 Q When did you --

9 A I said that I stopped.

10 Q When did you stop?

11 A Approximately 30 days ago.

12 Q At the time that you commenced soliciting per-
13 sons to purchase these notes, is it correct that you in-
14 tended to solicit sufficient persons to accomplish the
15 sale of \$1,250,000 thereof?

16 A Yes.

* * *

14 Q What was the occasion for the change of intent
15 which caused you to stop soliciting persons to buy the
16 notes approximately 30 days ago? -

17 A Give me one minute, Mr. Wachtell, and I will answer
18 you.

19 I felt that the people I was talking to, because of
20 financial conditions that exist today, are reluctant to
21 make investments. They want to stay in cash positions,
22 most of the people I talk to, and they just, because of
23 general economic conditions, psychological fear that is
24 running with people today, they just weren't interested
25 in making an investment.

